Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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Leadership is a behavior, not a position

CASE LAW UPDATES
FOURTH QUARTER

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 506 – INCHOATE OFFENSES

Holbrook v. Com., 2013 WL 5888270 (Ky. App. 2013)

FACTS: On the day in question, in Pike County, the victim later testified that she was approached by Holbrook while she was pumping gas. He demanded the money in her wallet. When the victim glanced toward him, he "lifted up his shirt to reveal the handle of a gun sticking out of his waistband." She told the robber she had no money; he said he'd just seen her at the bank (across the street, where she had made a deposit) and again demanded money. She again denied having any money. The man told her to finish pumping gas and she did so, and then "turned around and asked him what he wanted from her because she did not have any money." She got in her car, he got in his, and he drove away. She tried to see his license plate, unsuccessfully, and then went to the clerk, who called police. Ultimately, she identified Holbrook in a lineup.

Holbrook was convicted of Robbery 1st, Receiving Stolen Property and Possession of a Firearm by a convicted felon. He appealed.

ISSUE: Is an actual taking of property required for a Robbery charge?

HOLDING: No

DISCUSSION: Holbrook argued that the jury should have been instructed on attempt under KRS 506.010, because there was no actual taking of property. The Court looked to Lamb v. Com., and agreed that no actual taking was necessary for the charge.[1] "Because the robbery was accomplished, there was no evidence of an 'attempt.'"

Holbrook's conviction was affirmed.

Conner v. Com., 2013 WL 6157137 (Ky. App. 2013)

FACTS: Following his arrest on March 2, 2011, Conner was placed in the McCracken County Jail. There, he made two phone calls to his girlfriend, Hunter. Officer Cromwell (Paducah PD) subsequently listened to the calls and "grew suspicious." He believed that the pair was using code words given the context of the conversation and the discussion of the need to sell an unidentified item to raise bond money. He "determined the items" … "were worth a significant sum of money and not something Hunter wanted to be caught possessing or selling." Officer Cromwell

[1] 599 S.W.2d 462 (Ky. App. 1979); See also Kirkland v. Com., 53 S.W.3d 71 (Ky. 2001).

received information that identified the person mentioned in the conversations, "Winky" and obtained her address. He received consent from "Winky" to search her house.

Using the information from the phone calls, he found about 18 grams of crack cocaine, individually packaged. Conner was questioned and admitted his connection to the cocaine. He was convicted of Trafficking and PFO, and appealed.

ISSUE: Is Criminal Solicitation a separate crime?

HOLDING: Yes

DISCUSSION: Conner argued that he should have received an instruction on criminal solicitation to trafficking, as he argued it was a "lesser-included offense" to that crime. The Court agreed that Solicitation would be a separate and mutually exclusive crime, for which he could have (but did not) request a separate instruction.

Conner's conviction was affirmed.

PENAL CODE – KRS 508 – ASSAULT

Son v. Com., 2013 WL 5521871 (Ky. App. 2013)

FACTS: On the day in question, in Jefferson County, Son stabbed Duong in the back, using a 14-inch long knife. The knife went through Duong's shoulder and exited under his armpit, near the rib case. Duong was stabbed a second time, in the abdomen. EMS responded and treated Duong, finding that his blood pressure was decreasing to a dangerous extent. EMS started IV fluids to keep his blood pressure sufficiently high. Duong was considered a Level 1 trauma case at the hospital, but fortunately, it was discovered that the knife had not struck any vital organs, such as his lungs. He was sent home after two days with medication but did not return for follow-up care due to concerns about the cost. He was "functionally normal" a month later.

Son was charged with Assault 1st and Attempted Murder. The Court agreed he could be convicted of both, but could be sentenced for only one offense "because it was a continuing course of conduct." The jury sentenced him for Attempted Murder, but the Court elected to sentence him under the Assault conviction because it would require him to serve 85% of the sentence before he was eligible for parole. Son appealed.

ISSUE: Is proof of serious physical injury an element in Assault 1st?

HOLDING: Yes

DISCUSSION: Son argued that the Commonwealth failed to provide sufficient proof that Duong suffered a serious physical injury. The Court looked at the definition under KRS 500.080(15) and noted that although it turned out that none of the wounds pierced Duong's chest or abdominal cavities, he did lose considerable blood due to the

stab wounds. His blood pressure dropped dangerously low and serious damage was averted only due to the prompt and expert treatment provided by EMS.[2] "Simply because the victim did not die and was fortunate enough to recover from his injuries, does not erase the fact that he faced a 'substantial risk of death.'"[3]

The Court upheld Son's conviction.

PENAL CODE – KRS 509 – KIDNAPPING

Handle v. Com., 2013 WL 6729962 (Ky. 2013)

FACTS: On February 11, 2011, Handle was at home in Breckinridge County with his girlfriend, Hager, and their infant child. He became enraged over dirty dishes, and began to verbally, and then physically, abuse Hager – tying her up, shooting her with a paintball gun and smacking her in the face with a machete. This continued for three days, with Handle only untying Hager to care for the baby, and then threatening her (and her family) if she escaped. When Handle finally left the house, Hager called her family and eventually went to the Hardin County Attorney for help. Trooper Riley photographed her injuries.

Handle admitted to the trooper that he'd shot her with the paintball gun. He was indicted for Kidnapping, Assault 2nd and Wanton Endangerment 1st. Handle was eventually convicted of the first two charges, and appealed.

ISSUE: May Assault and Kidnapping both be charged?

HOLDING: Yes

DISCUSSION: Handle argued that he should have received a directed verdict on the charge of Kidnapping, claiming that it was too much when combined with respect to the Assault charge. The Court looked at the "Kidnapping Exemption" statute (KRS 509.050) and noted that:

> In order for the exemption to apply: (1) "the criminal purpose must be the commission of an offense defined outside Chapter 509;" (2) "the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense; and" (3) "the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense."[4]

The Court agreed that the restraint was not incidental to the crime of assault, and in fact, occurred over the course of several days. In short, the restraint was unnecessary to the assault, as Handle could have committed the assault without restraining Hager.

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[2] Brooks v. Com., 114 S.W.3d 818 (Ky. 2003).
[3] Cooper v. Com., 569 S.W. 668 (Ky. 1978).
[4] Murphy v. Com., 50 S.W.3d 173 (Ky. 2001); see also Hatfield v. Com., 250 S.W.3d 590 (Ky. 2009).

In an unrelated issue, Handle argued that he was denied the opportunity to present a defense when the court refused his motion to order Hager to reveal the user names and passwords for her Facebook and MySpace accounts. The assertion apparently related to possible use of social media during the time Hager claimed to be restrained. The Court looked to RCr 7.24 and found nothing that would compel the discovery requested. (The opinion noted that there was no indication that such evidence even existed, only that Handle thought it might exist, and the Commonwealth argued that this was "the electronic version of searching [Hager's] underwear drawer.") The Court agreed that Handle's "speculation that Hager's Facebook or MySpace accounts may have indicated that she was not keeping her story straight" was not enough to justify compelling the production of the evidence. The Court agreed that Handle was free to question her about postings she'd made during cross-examination, but chose not to do so.

The Court upheld his convictions.

PENAL CODE – KRS 510 – SEXUAL OFFENSES

Hillebrandt v. Com., 2013 WL 6212240 (Ky. App. 2013)

FACTS: Hillebrandt engaged in sexual intercourse with A.M., age 25. A.M. has an I.Q. of 48, the lowest one percent. At trial, she testified that she understood what sexual intercourse was and that Hillebrandt forced her to have sex with him when she did not want to do so. She said she did not know how babies were made but did have a 3-year-old child.

Hillebrandt argued at trial that although A.M. was mentally disabled, she understood what sex was and thus could consent to it. He was convicted of Rape 3d and appealed.

ISSUE: Does understanding sex imply that the individual is mentally able to consent to it?

HOLDING: No

DISCUSSION: Hillebrandt argued that under Salsman v. Com., he could not be convicted of Rape, because his victim was not so mentally disabled as not to understand sexual intercourse.[5] He argued that Salsman stood for the proposition that someone who understood sexual intercourse was capable of consenting to it. The Court, however, noted that the evidence did not demonstrate that A.M. was capable of consenting, only that she "understood" it. Further, it does not show she had any understanding of it prior to Hillebrandt engaging in sex with her.

The Court upheld his conviction.

[5] 565 S.W.2d 638 (Ky. App. 1978).

PENAL CODE – KRS 514 – THEFT

Slatten v. Com., 2013 WL 5788120 (Ky. App. 2013)

FACTS: Slatten was indicted on multiple charges of Theft by Failure to Make Required Disposition and Theft by Deception (both over and under $300). He was indicted several months later on additional charges of both. Under the first indictment, he pled guilty to a few of the charges and then pled guilty to several more. The sentences were all to be served concurrently. However, he received probation for all. In 2010, his probation was revoked due to failure to comply. He moved for relief and was denied. He then appealed.

ISSUE: Are multiple counts of theft, over a long period of time, a "spree?"

HOLDING: No

DISCUSSION: Slatten argued that "because his crimes were committed as part of one spree, they constituted one act." The Court noted that he wrote checks from a non-existent account at least 56 times over two years and that did not qualify as a spree.

The Court upheld his conviction.

CONTROLLED SUBSTANCES

Com. v. Hamilton / Cole, 411 S.W.3d 741 (Ky. 2013)

FACTS: In 2008, Hamilton and Cole were indicted for trafficking in Suboxone, a synthetic opiate. Suboxone contains two active ingredients, buprenorphine and naloxone. In 2002, buprenorphine was moved from Schedule V to Schedule III, under both Kentucky and federal law.

During a pretrial hearing, due to confusion over Suboxone's rescheduling, it was stipulated that the Cabinet for Health and Family Services is able to "'similarly control' any substance that is 'designated, rescheduled, or deleted as a controlled substance under federal law" pursuant to KRS 218.020(3). The Court looked at 902 KAR 55:025(7), which had added buprenorphine itself to Schedule III, but Hamilton and Cole argued that the CFHS had not made "the statutorily required findings" detailing the effects of the drug and the reason for controlling it. (It appeared Kentucky simply followed DEA guidance on the drug, which was not available in the U.S. at the time it was added to the federal list.)

The trial court ruled that the delegation to CHFS, and its decision, were "proper and constitutional." It agreed that it could not rule on the underlying procedures used by the DEA, however, as that was a federal agency. Hamilton and Cole took a conditional guilty plea and appealed. The Kentucky Court of Appeals reversed the trial court,

remanding for a specific hearing on the constitutionality of KRS 218A.020(3) and required that the Attorney General and CHFS be added as necessary parties. The Commonwealth appealed.

ISSUE: Is changing the schedule classification of a drug in accordance with DEA recommendations proper?

HOLDING: Yes

DISCUSSION: The Court chose not to delve into the challenge to the constitutionality of the statute, finding instead that the trial court did have jurisdiction to "rule on Hamilton and Cole's initial argument regarding the validity of the regulation." (If constitutionality is raised at the trial court level, the Attorney General must be notified, but is not necessarily going to be involved.) The Court agreed that it was proper, however, for the trial court to have jurisdiction to hear the issue as to whether CHFS properly regulated buprenorphine under the statute, by moving it to Schedule III classification, as it was also so classified by the DEA.

The Court agreed that the statute "simply adopts the procedures used and findings made by the federal government" and are strikingly similar. [6] The Court noted that it is important that CHFS follow the statute, but noted that previously, it had not been held necessary to show that CHFS has made independent listed findings concerning a drug – instead, the federal findings could be viewed as the findings of CHFS. It was proper for the Court to take judicial notice of the federal regulation, although of course, they were free to challenge the methodology used by the DEA in its decision.

The Court reversed the Kentucky Court of Appeals and remanded the case to the trial court, during which time the parties could raise challenges to the process followed by CHFS.

Quintana v. Com., 2013 WL 5521640 (Ky. App. 2013)

FACTS: In August, 2011, a Greenville PD officer served an arrest warrant on Quintana. He was searched subsequent to the arrest but nothing was found. He was asked by the officer if he possessed any contraband that had been missed but received no response. At the jail, a deputy jailer went through Quintana's wallet and found a small amount of methamphetamine. Quintana was charged with Promoting Contraband, convicted, and appealed.

ISSUE: Is knowing possession of a controlled substance sufficient for a Promoting Contraband charge?

HOLDING: Yes

DISCUSSION: Quintana argued that he should have received the alternate

[6] See Com. v. Hollingsworth, 685 S.W.2d 546 (Ky. 1984).

instruction of simply possessing the methamphetamine, because he had forgotten it was in his wallet and hence wasn't "knowingly" possessing it. The Court noted that the mens rea was the same for both charges, and as such, he was not entitled to an instruction on possession.

The Court upheld his conviction.

DUI

Com. v. Parrish, 2013 WL 6198351 (Ky. App. 2013)

FACTS: On November 18, 2010, Parrish was stopped for failing to make a complete stop at two stop signs. Officer Cobb (Nicholasville PD) gave him FSTs and although Parrish did not show any speech or balance issues, Cobb determined that Parrish shows signs of impairment. He administered a PBT and recorded the result by "showing it to his cruiser video." The citation noted that the PBT indicated the presence of alcohol, but not the numerical result. Cobb did not recall the specific number at trial, either. Parrish was charged with DUI. The officer conceded that the PBT may have been under .080%. At the jail, Parrish's Intoxilyzer result was .086%.

Parrish requested, prior to trial, the cruiser video, but it was found not to exist. Since no formal discovery request was made, however, no hearing was held on the issue. It was conceded that the video was not "purposefully destroyed by Officer Cobb." The Commonwealth pursued the DUI under the "per se" violation of KRS 189A.010(1)(a). The trial court ruled that Parrish was guilty and he appealed to the Jessamine Circuit Court. He argued at that level that Brady v. Maryland was violated because Officer Cobb did not preserve the video. The Circuit Court agreed, finding a Brady violation, and reversed and remanded the case back to the trial court with instructions to conduct a Daubert[7] hearing on the PBT results. The Commonwealth requested review by the Kentucky Court of Appeals.

ISSUE: May PBT results be admitted for exculpatory purposes?

HOLDING: Yes

DISCUSSION: The Court reviewed the Circuit Court's analysis, in which the Court noted that a PBT result of less than .08% is "exculpatory and is material if it is otherwise admissible." In Stump v. Com., the Court had ruled that a PBT may be admitted "to determine the defendant's blood alcohol level close in time to his operation of the car."[8] In Stump, it was held that the prohibition on using a PBT to prove guilt, KRS 189A.104, was inapplicable in such instances. Parrish argued that the missing PBT result should have resulted in his having received a "missing evidence instruction." Under Tinsley v. Jackson, such an instruction "requires that 'the evidence was intentionally destroyed by

[7] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S.579 I1993).
[8] 289 S.W.3d 213 (Ky. App. 2009).

the Commonwealth or destroyed inadvertently outside normal practices.'"[9] In this case, Officer Cobb failed to record the number on his citation and "somehow misplaced the cruiser video."

The Court summarized:

> In order to prove that a Brady violation occurred, there must be a showing that: (1) exculpatory evidence existed, (2) that it was in the custody or control of the agents of the Commonwealth, (3) that it was not disclosed to the defense, and (4) that prejudice resulted from the failure to disclose.

Since the PBT result was arguable exculpatory, and not preserved, the Court agreed that the Circuit Court's decision was correct.

ARREST

Goncalves v. Com., 404 S.W.3d 180 (Ky. 2013)

FACTS: On February 4, 2008, in Nelson County a Boston business was robbed by three men. They threatened the clerk, Hall, with a gun and forced him to open the safe. They knocked Hall to the ground and emptied the safe. Det. Mattingly (Nelson County SO) reviewed the surveillance footage from the security cameras. The next day, in Hardin County, drug task force members stopped Jones's vehicle, believing he was involved in manufacturing methamphetamine. They learned there was a warrant for Jones on an unrelated matter. Jones agreed to a search and liquor and other items from the robbery the day before were discovered in the trunk. Jones was given Miranda and questioned; he admitted to committing the robbery with Giguere and Goncalves. The information was relayed to Det. Mattingly, who got a warrant for Goncalves.

While executing the warrant, the officers spotted a pistol and a marijuana pipe in plain view. Another person at the house, Willoughby, stated that they are earlier sought Jones, while armed, as Goncalves thought Jones had stolen drugs and money from him. Det. Sgt. Cave, of the task force, obtained a search warrant for Goncalves's home in Grayson County. They found a pistol and a number of other items there.

Goncalves was indicted. His first two trials were mistried due to deadlock. During the third trial, both Jones and Giguere testified that Goncalves provided the weapons and knocked the clerk to the ground. Willoughby testified the Jones admitted to committing the robbery with Giguere and Goncalves.

Goncalves was convicted of Robbery 1st and appealed.

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[9] 771 S.W.2d 331 (Ky. 1989); See also Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

ISSUE: Must an officer have an arrest warrant "in hand" in order to execute it?

HOLDING: No

DISCUSSIION: Goncalves argued that since there was no arrest warrant at the time he was arrested at his apartment, "the officers were illegally present in his residence when they observed incriminating items in plain view." The trial court had ruled that in fact there was a warrant in existence. The evidence indicated that Sheriff Newton (Nelson) obtained the warrant and then faxed it from Nelson County to Det. Mattingly, who received it while at the Leitchfield PD in Grayson County. The Court agreed that a "peace officer need not have a warrant 'in hand' in order to execute it.[10] Goncalves challenged the time, noting that the timestamp indicated a time about 25 minutes after he was arrested. The Court, however, took judicial notice that the two counties were in different time zones, and that the machine in Nelson County would have indicated a time an hour later than it was in Grayson County. There was also a question of whether one or both machines were time-calibrated. The Court agreed that the warrant existed prior to the arrest.

With respect to the search warrant, Goncalves complained that the affidavit was based on statements given by "unreliable accomplice snitches" and as such, was invalid. The court, however, found that the two individuals were named and that other factual observations were shared with the detective who obtained the warrant. Goncalves argued that the warrant did not include the information that the informants were "drug-addicted accomplices" who were "known to be unreliable." The Court did not agree that was enough to invalidate the warrant, however.[11]

Goncalves also argued that the surveillance footage, preserved on DVD, was not admissible, because the source, the hard drive, had not been preserved. In fact, the Court gave the jury a "missing evidence" instruction, apparently. The Court refused to reverse the conviction on Brady,[12] however, finding no indication that the Commonwealth destroyed the hard drive evidence in bad faith.[13] The technician testified as to his process in copying the footage, which resulted in gaps, explaining that the gaps were when the motion-detecting cameras did not actually record any images. He testified that he did not edit the footage in any way, but only copied the footage that was relevant to the robbery. Any possible error was cured by the instruction provided.

After resolving a number of other issues, the Court affirmed Goncalves' conviction

[10] RCr 2.10.
[11] See Lovett v. Com., 103 S.W.3d 72 (Ky. 2003).
[12] Brady v. Maryland, 373 U.S. 83 (1963).
[13] Brady v. U.S. , 397 U.S. 742 (1970); Arizona v. Youngblood, 488 U.S. 51 (1988).

SEARCH & SEIZURE – SEARCH WARRANT

McIntosh v. Com., 2013 WL 6571801 (Ky. App. 2013)

FACTS: On May 27, 2011, Trooper Smith (KSP) was working in Booneville looking for a stolen vehicle and a suspect (Gabbard). He was accompanied by a local constable who told him that Gabbard and McIntosh were friends, and directed the trooper to McIntosh's home. At the house, the trooper noticed a burn pile near the house and the smell of ether coming from the house. He saw a "water bottle generator" on the front porch. Trooper Smith knocked, but no one answered. He left to get a search warrant, leaving the constable and another trooper holding a perimeter.

In the affidavit, the trooper stated that "he had reasonable grounds to believe that '[i]llegal drugs, chemical agents or products used in the manufacture of illegal narcotics'" would be found at the home. He received the warrant and it was immediately executed. During the search, he found a number of items, some "laced with methamphetamine residue." McIntosh was indicted and charged.

McIntosh moved for suppression, arguing that the "search warrant affidavit was overly broad and did not provide probable cause. The trial court denied the motion. McIntosh took a conditional guilty plea and appealed.

ISSUE: Should the address of a residence to be searched be incorporated into the narrative of the affidavit?

HOLDING: Yes

DISCUSSION: The court noted that the trooper "cited the identifiable odor of ether" coming from the house, along with the burn pile and water bottle. As such, the Court agreed that was sufficient. The Trooper's affidavit properly included a street address and description, and the "address and description were incorporated into the warrant." McIntosh argued that since the warrant did not identify him specifically as a person to be searched or questioned, it was insufficient, to which the Court disagreed. Further, it noted that it was also not necessary to identify the precise room where the items would be found, inside the house.

The court upheld McIntosh's plea.

Bennett v. Com., 2013 WL 6571788 (Ky. App. 2013)

FACTS: Items related to manufacturing methamphetamine were found in Bennett's residence during a search warrant execution, at his home in Owsley County. He moved to suppress, arguing that the search warrant was insufficient. The trial court concluded that "the affidavit lacked sufficient indicia of probable cause" – it was signed by a trial commissioner. However, the Court ruled that the evidence would not be

suppressed as the officers had "good faith" under U.S. v. Leon[14] that it was a valid warrant.

The warrant affidavit read as follows:

> On the 14th day of September 2011 approximately 2:00 pm affiant received information from/observed: A confidential informant wherein the informant advised the affiant by a written statement after receiving information that Terry Bennett at his residence is trafficking drugs and Manufacturing Methamphetamine. The Informant advised Officers that he has seen the precursors for Manufacturing Methamphetamine inside the residence.
>
> The affiant conducted the following independent investigation which was driving to the location of the building in question to verify that the location and description matched the description given by the confidential informant.

Specifically, the trial court ruled that the "affidavit lacked a statement as to the veracity of the informant, there was no explicit and detailed description of the of the wrongdoing, there was no time of observation listed in the affidavit, and the officer's investigation was inadequate because it consisted only of verifying that a house was located at the address provided by the confidential informant." However, it ruled that the officer was not wrong in relying on the signed warrant and refused to suppress it.

Bennett appealed.

ISSUE: Is independent investigation of an informant's information preferable?

HOLDING: Yes

DISCUSSION: Bennett argued that a "reasonably well-trained officer would have known that the trial commissioner erred in granted the warrant." Further, he contended "that the officer's failure to do additional independent investigation, and the lack of specific information in the search warrant" made the warrant invalid.

The Court compared the information known in this case to that known in Crum v. Com.[15] and noted that in this case, the deputy did provide some information, however minimal, and did a small amount of investigation to corroborate the CI. The Court agreed that a "reasonably well-trained police officer could assume, in good faith, that an eye-witness tip combined with an independent investigation was sufficient to convince" the magistrate.

The court upheld the decision denying the suppression of the evidence.

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[14] 468 U.S. 897 (1984).
[15] 223 S.W.3d 109 (Ky. 2007).

Warriner v. Com., 2013 WL 5765137 (Ky. App. 2013)

FACTS: On June 17, 2011, in Adair County, Curry reported a suspicious item believed to be a one-step methamphetamine lab. KSP responded and agreed that it was likely to be the case. Curry reported that he believed Warriner had left it there. As the item was being cleaned up, Troopers Wolking and Davis drove to Warriner's home. When they arrived, they "immediately detective a strong, pungent odor that they recognized to be chemicals associated with the manufacture of methamphetamine." Trooper Davis, approaching the porch, spotted another one-step lab (soda bottle). The also saw a "person peek out of the front door and retreat back into the house." The troopers positioned themselves outside in such a way so that they could watch the house, at the same time clearing outbuildings and vehicles. Trooper Perkins arrived and he spoke to the occupants through a window. Trooper Wolking spotted items inside that were associated with the manufacture or use of methamphetamine. Trooper Perkins persuaded Warriner and his companion to leave the house and Trooper Wolking went to get a search warrant. When he returned, the troopers searched and located "nearly all the ingredients necessary for manufacturing methamphetamine."

Warriner was indicted and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Might circumstances allow for an officer to look into a side window?

HOLDING: Yes

DISCUSSION: Warriner argued that the "troopers illegally obtained the evidence used to execute the search warrant." Allegedly, the troopers "posted up" outside the side window (while another trooper was knocking) by standing on some item. The Court agreed that a knock-and-talk involves the main entrance to a home.[16] Warriner argued that by going to the side window, the troopers "exceeded the boundary permitted by the principles of knock and talk." The Commonwealth argued, however, that "the troopers acted properly in light of exigent circumstances at the scene" The Court looked to two possible exigencies that justified their actions, and would have even justified their entry, but, the Court noted, they "exercised an abundance of caution in obtaining a warrant even though the exigent circumstances might have rendered their precaution unnecessary." The Court pointed to the "plain smell" justification as one exigency.[17] As such, "merely speaking with Warriner and looking through an open window were wholly appropriate." Further, when someone looked out the front, and then retreated back inside, it was proper for the troopers to "position themselves around the house so that the front and back entrances would be visible in order to prevent the possible flight of a suspect."[18] Finally, the acknowledged risks of methamphetamine manufacture made it reasonable for the troopers "to proceed to areas of the house other than the front porch."

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[16] Quintana v. Com., 276 S.W.3d 753 (Ky. 2008)
[17] Bishop v. Com., 237 S.W.3d 567 (Ky. App. 2007).
[18] Brigham City, Utah v. Stuart, 547 U.S. 398 (2006).

The Court affirmed Warriner's plea.

Lewis v. Com., 2013 WL 1352031 (Ky. App. 2013)

FACTS: On February 6, 2011, At approximately 3 a.m., Officer Robbins (Newport PD) spotted a vehicle blocking a street. When it did not move for several minutes, he approached. The vehicle was running and a subject was sitting in the passenger seat. He stated that the driver (Lewis) would return momentarily. Lewis then did approach, with his hands in his pockets. Robbins asked him to remove his hands and "for his own safety, asked [Lewis] if he had any drugs or guns on his person." Lewis stated he had two small amounts of marijuana, which the officer retrieved. When asked if he had any more, Lewis said he had some at home. Officer Fangman approached and was told what had been said. The passenger, who had valid ID, was permitted to leave. Officer Fangman gave Lewis his Miranda rights. Lewis was told he might be cited and released, or might be arrested, depending upon what was found in his home. Lewis gave consent to enter the home and search his living space, the basement. More marijuana, and a roll of cash that Lewis said was proceeds from selling marijuana, was found. They also found two scales and small plastic baggies. Lewis was arrested. (Lewis contended that he did not give consent, but that once they made it clear that they were going in, he agreed to show them where the marijuana was to avoid disrupting his mother's home." He also argued he was handcuffed and never given his Miranda warnings.)

When suppression was denied, Lewis took a conditional guilty plea and appealed.

ISSUE: May an officer approach someone to speak to them, without reasonable suspicion of an actual crime?

HOLDING: Yes

DISCUSSION: The Court reviewed each of the contacts. First, Lewis argued that he was improperly detained by Robbins "without reasonable suspicion that he was engaged in criminal activity."[19] The Court agreed it was proper for Robbins to approach the vehicle blocking the roadway. During that interchange, Lewis "voluntarily admitted he had illegal drugs on his person and inside his house." That gave Robbins probable cause to hold him. Lewis then argued that his statement about additional marijuana in the house was given during an unwarned custodial interrogation. The Court, however, found "no evidence of physical intimidation, coercion, threatening behavior or restraint of movement." The Court found the statement was properly admitted.

Finally, the Court looked at the consent to search. The officers and Lewis disagreed as to what was said, and it fell to the court to weigh credibility. The Court found that his consent was given voluntarily, even if under the circumstances Lewis posited.

[19] Terry v. Ohio, 392 U.S. 1 (1968).

NOTE: Although never specifically stated in the opinion, since the officers had sufficient probable cause to seek a warrant, the fact that they stated they might get a warrant was not enough to invalidate his consent.

SEARCH & SEIZURE – FRISK

Jones v. Com., 2013 WL 4779749 (Ky. App. 2013)

FACTS: On the day in question, Officer Cooper (Lexington PD) and Agent Maynard (ATF) made a traffic stop of Jones, who was not wearing a seat belt. Jones did not pull over immediately, "instead, he acted nervous, checked his mirrors and seemed to be manipulating something in the center console of his car." When he did pull over, Officer Jones immediately had Jones get out, with the intention of doing a frisk. "Jones was confrontational about getting out of the car," claiming the vehicle was a rental and he would be late returning it. Cooper frisked Jones, finding nothing.

Cooper asked for ID and Jones reached in his pocket to pull out a wallet. A baggy fell out, as well, and Cooper picked it up, finding it "contained little crumbles resembling crack cocaine." He asked for permission to search the car, Jones refused. The officer called for a K-9, which arrived in minutes. The dog alerted but nothing was found in the vehicle. Cooper searched Jones, finding broken tablets of alprazolam (Xanax). Jones claimed he had a prescription.

Jones was charged for the cocaine and the Xanax. He argued during a suppression hearing that he was wearing his seat belt and disputed much of the above. The Court found the stop appropriate and that the officer "articulated a legitimate reason for the subsequent frisk because Jones was reaching around inside the car." Jones took a conditional plea and appealed.

ISSUE: Is a frisk justified when the suspect is acting in a manner that suggests he might have a weapon?

HOLDING: Yes

DISCUSSION: Jones focused his appeal on his argument that the Terry frisk was illegal. The Court noted that "if the frisk had not occurred, Jones would still have been seated in the car and the baggy might not have fallen from his pocket when he withdrew his wallet." Jones argued that his actions were not so suspicious that they would justify the frisk. The Court disagreed, finding such investigative detentions in vehicle to be "especially fraught with danger" to law enforcement and affirmed his plea.

NOTE: In a concurring opinion, the Court noted that Jones's argument that he would have been able to stay in the car, absent the frisk, was incorrect, since under

Pennsylvania v. Mimms[20] and West v. Com.,[21] the officer would have had the right to have him get out of the vehicle for *any* reason.

Hall v. Com., 2013 WL 5604693 (Ky. App. 2013)

FACTS: On May 26, 2011, Lexington PD received an anonymous tip that a possible murder suspect had been seen at a bus stop. Officers arrived and spotted the man matching the caller's description as he stepped into the breezeway of an apartment complex. Sgt. Jared parked and approached, seeing that the man (Hall) was talking on the phone. Hall started up the stairs. When he turned and spotted Sgt. Jared, the officer told Hall he needed to talk to him. Hall ended the call and began to back away, frantically trying to open an apartment door. Sgt. Jared grabbed him and asked about drugs or guns, getting no answer. He took control of Hall and frisked him, finding a "hard metal object" in a back pocket. He demanded whether it was a gun, and Hall "shrugged his shoulders and slightly nodded his head." A loaded firearm was found, along with marijuana.

Since Hall was a convicted felon, he was charged with the weapon and the marijuana. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does actively evading contact with an officer justify a frisk?

HOLDING: Yes

DISCUSSION: Hall argued that the frisk was unlawful. The Court agreed that Hall was in a high crime area, refused to speak to Sgt. Jared and actively backed away from him, trying to evade him by escaping into an apartment. Given his behavior, the Court agreed that a Terry frisk was warranted.

Hall's plea was affirmed.

SEARCH & SEIZURE – EXIGENT ENTRY

Gill v. Com., 2013 WL 5886234 (Ky. App. 2013)

FACTS: On February 4, 2010, Louisville Metro PD informed KSP that a suspicious package was being shipped through FedEx to Lexington. KSP intercepted it and a drug dog alerted on it. It obviously smelled of marijuana, even to the officers. The package was seized and a search warrant obtained. Inside they discovered about 6 pounds of marijuana. The package was reassembled and delivered to the Lexington address on the package, with the label indicating the recipient was Moore. It was delivered and accepted by Gill's girlfriend, which whom he had a child. Gill did not live at the residence, but did spend the night there on occasion and was there when the

[20] 434 U.S. 106 (1977).
[21] 358 S.W.3d 501 (Ky. App. 2012)

package was delivered. When she accepted the package, troopers (one disguised as a FedEx employee) rushed inside and did a safety sweep, handcuffing Gill. (They did not handcuff his girlfriend.)

They received consent to search, but did not search. The troopers talked to Gill, after telling him he was not under arrest and could leave. He indicated he was expecting a shipment of clothing. During that time, KSP had searched his phone for Arizona numbers, as the package originated in Tempe. Gill then called a relative in Indiana as well as an individual in Arizona (whose number was in his phone), at the direction of the troopers. With the latter, he "made up a false story about the package arriving wet and damaged, in an effort to obtain more information." Gill told Det. Addison that "he would try to figure out what was going on with the package and promised to contact him by the end of the week." He did not, however, and was arrested a month later for trafficking in marijuana.

Gill moved to suppress the information obtained from his cell phone and his statements to the troopers. The motions were denied. He took a conditional guilty plea and appealed.

ISSUE: Are officers permitted to do a warrantless entry to a location where known contraband has been delivered?

HOLDING: Yes

DISCUSSION: First, Gill argued that the warrantless entry violated the Fourth Amendment, as the troopers did not have a warrant for the apartment.[22] Det. Addison had argued that they weren't sure if the package was going to the correct address, if someone would accept it, etc. In U.S. v. Singh, the Court had ruled that "the police had a limited right to enter the premises where the seized contraband had been delivered."[23] Gill further argued that the protective sweep went beyond what was permitted, and once inside, the sweep was justified to address any possible safety threat.[24] In addition, the primary resident, his girlfriend, did give consent for a full search, which in fact the police never performed.

Finally, Gill argued that his statements and phone conversations were the products of a custodial interrogation without the benefit of Miranda. The Court agreed that while Gill was handcuffed, he was in custody. However, his "incriminating statements were made only after the handcuffs had been removed, and he had agreed to cooperate with the police in the police in an effort to help himself by implicating others."

The Court upheld the denial of the motion to suppress and affirmed his plea.

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[22] The trial court had ruled that he did have standing as a regular, overnight guest.
[23] 811 F.2d 758 (2d Cir. 1987); see also U.S. v. DeBerry, 487 F.2d 448 (2nd Cir. 1973).
[24] Maryland v. Buie, 494 U.S. 325 (1990).

SEARCH & SEIZURE – ABANDONED PROPERTY

Talbert v. Com., 2013 WL 5885965 (Ky. App. 2013)

FACTS: On March 27, 2010, Det. Curtsinger (Lexington PD) receipted a tip that Talbert was dealing in large amounts of cocaine. Information on his vehicles and his general address, by area, was provided. Upon investigation, Talbert was identified as living in that area and owning the vehicles described. Curtsinger was also familiar with where the residents of the area kept their trash cans and how they were placed out for pickups.

Curtsinger searched the contents of the trash can (two bags and two pizza boxes). Inside he found marijuana evidence. The pizza boxes included labels that gave Talbert's address and a cell phone number belonging to an Angela Talbert, as well.

Curtsinger obtained a search warrant for the home, and the subsequent search yielded both powder and crack cocaine, over $7,000 in cash and related evidence. Talbert moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a search through a trash receptacle at the pickup point allowed?

HOLDING: Yes

DISCUSSION: Talbert argued that the search of the receptacle was improper. The trial court had ruled that the receptacle did belong to the home occupied by Talbert and that it had been placed on the driveway, at the curb, and was thus legally abandoned. The Court agreed that Kentucky does not provide for greater protections against search and seizure than does the Fourth Amendment. It also agreed that Lexington's ordinance, which prohibited anyone other than trash collectors from removing trash, to have no bearing on a Fourth Amendment search that was otherwise lawful.

With respect to the search warrant, the Court agreed there was sufficient evidence "to create a nexus" between the home and the trash receptacle. Its location, the information on the pizza boxes and the tip together provided a high level of probable cause to support the search warrant.

The Court upheld Talbert's plea.

Ashlock v. Com., 403 S.W.3d 79 (Ky. App. 2013

FACTS: Lexington PD did a warrantless trash pull of a receptacle at the curb of Ashlock's home. Using items located, they obtained a warrant for his residence and found a number of marijuana plants. Ashlock was charged with cultivating. He moved for suppression, arguing that the trash pull violated Lexington's ordinance, referred to as the "antirummaging" ordinance, which prohibited anyone but trash

collectors to interfere with or remove trash set out for pickup. The Court denied the motion. Ashlock took a conditional guilty plea and appealed.

ISSUE: Does violating a law against getting into trash implicate the Fourth Amendment?

HOLDING: No

DISCUSSION: The Court looked to the case of Magda v. Benson, and agreed that the "search of an abandoned trash receptacle in violation of a local anti-rummaging ordinance did not implicate the Fourth Amendment."[25] The Court agreed the "Lexington ordinance has no bearing on the validity of the search under the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution.

The Court upheld his plea.

SEARCH & SEIZURE – SWEEP/ BUIE SEARCH

Barrett v. Com., 2013 WL 5886509 (Ky. App. 2013)

FACTS: On March 12, 2012, Covington PD went to a home "to execute multiple arrest warrants upon Barrett based on an anonymous tip he was present at the residence." (The location was listed in his name and the last contact they'd had with him had been at that location.) When they arrived, they swept the exterior and "heard voices and glasses clinking inside the house."

Officer Edwards knocked and announced and the "voices ceased." He knocked again, louder, using his flashlight, which caused the door to swing open. The officers identified themselves and announced they were coming in, getting no response. Officer Isaacs did a "safety sweep" downstairs and Edwards stayed at the foot of the steps to the second floor. Barrett's stepmother, Deborah, came down. She said she was the owner and that Barrett was upstairs hiding in a closet. Officers Isaacs and Christian went up to find him. They found one closet and Officer Christian stayed there, while Officer Isaacs did another protective sweep. He spotted syringes and other paraphernalia suggesting heroin. Barrett was found in the closet by Officer Christian. Officer Isaacs stopped sweeping and assisted with the arrest. He secured the other evidence. Deborah Barrett told them the room where it was found was Barrett's.

Barrett was indicated of Possession of a Controlled Substance. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May officers sweep a location when looking for a suspect for whom they have a warrant?

[25] 536 F.2d 111 (6th Cir. 1976).

HOLDING: Yes

DISCUSSION: Barrett first argued that the entry, without a separate search warrant, was unlawful. The Court noted that the officers "possessed multiple valid arrest warrants" for him, and had a tip that he was there. Further, to their knowledge, he owned the house – although later it was shown his father, with the same name, actually did so. Barrett did reside there. Under Payton v. New York, the entry was admissible.[26]

With respect to the upstairs sweep, the Court agreed that "law enforcement officers may conduct a protective sweep for their own safety."[27] When the officers learned that Barrett was upstairs hiding in a closet, but were not told which closet, it was proper for the officers to sweep to check out all possibilities. In fact, Officer Isaacs stayed "within eyesight of the hallway closet at all times during the protective sweep." The evidence was found in "plain view on a dresser and television stand in Barrett's bedroom adjoining the hallway." As the officers were making a valid arrest, it was proper for them to do a sweep on the rooms near where Barrett was found.

Barrett's plea was affirmed.

Brumley v. Com., 413 S.W.3d 280 (Ky. 2013)

FACTS: In spring, 2009, Sheriff Riddle (Clinton County SO) made several attempts to serve Brumley with an arrest warrant. On May 29, he got a tip as to where Brumley might be found, a mobile home which was not his primary residence. Brumley was renovating the trailer and stayed there on occasion to protect it. At about midnight, the Sheriff, along with other officers, went to the trailer. When he knocked, Brumley came outside. He was placed under arrest and searched some feet away from the trailer. He was not armed.

Officers heard a "rustling" or "shuffling" noise inside the trailer. They had prior information that there might be guns inside. They entered and did a protective sweep, finding that a "dog was the source of the noise." They also found "several components" of a methamphetamine lab, as well.

Brumley was charged with manufacturing methamphetamine. He moved for suppression, which was denied. He was convicted and appealed.

ISSUE: Does the suspicion of guns justify a protective sweep search?

HOLDING: No

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[26] 445 U.S. 573 (1980).

[27] Guzman v. Com., 375 S.W.3d 805 (Ky. 2012); See also Kerry v. Com., 400 S.W.3d 250 (Ky. 2013); Maryland v. Buie, supra

DISCUSSION: The Court reviewed the matter in the context of the "'protective sweep' exception articulated in Maryland v. Buie,[28] only recently adopted in Kentucky by Guzman v. Com.[29] In Kerr v. Com., most recently, the Court " recognized that Buie permits "two types of protective sweeps incident to an arrest that are reasonable and lawful under the Fourth Amendment."[30]

The Court continued:

> The first type of protective sweep allows officers "as a precautionary matter and without probable cause or reasonable suspicion, [to] look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." The second type of protective sweep "allows officers to undertake a broader search of places not adjacent to the place of arrest if there are `articulable facts, which taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.'" This is the well-known reasonable suspicion standard. However, Kerr only applied the first category articulated in Buie. In contrast, .the case currently before the Court requires that, for the first time, we apply the second Buie category.

The court agreed that Brumley was outside the trailer when arrested and that at no time did officers have to enter the trailer. As such, no "room or space whatsoever found inside the mobile home adjoined the place of arrest, as the arrest occurred entirely outside the residence."

> With respect to the second category, the court noted that in cases prior to Guzman (when Buie was adopted by Kentucky), it had held that a higher standard, probable cause, was necessary.[31] As such, and to the extent that they conflict, those cases are now overruled. With Guzman principles in mind, the Court looked to whether the officers "harbored the requisite reasonable suspicion needed to give rise to a constitutional protective sweep." The court noted that "The justification for a protective sweep is the safety threat posed by unseen third parties in the house."

In this case, the arrest was at night, in a mobile home that lacked electricity and was "located in a remote area of a rural county." Although not ideal, "poor lighting" does not lead to a risk that there is someone dangerous at the scene.[32] The prosecution described the trailer as "broken down," and the Court noted that "that the unseemly appearance of Brumley's single-wide castle is of no consequence to our analysis. Even a "ruined tenement" receives constitutional protection." The Court also gave no meaning to the fact that they were there to serve a felony arrest warrant, since to permit

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[28] 494 U.S. 325 (1990).
[29] 375 S.W.3d 805 (Ky. 2012).
[30] 400 S.W.3d 250 (Ky. 2013).
[31] See Southers v. Com , 210 S.W.3d 173 (Ky. App. 2003).
[32] U.S v. Archibald, 589 F.3d 289 (6th Cir. 2009).

such would "render Buie meaningless." Even the defendant's own prior history is irrelevant with respect to whether the officers have a reasonable belief that someone else inside a residence might pose a danger.[33]

The Court acknowledged that it has "reservations concerning the extent to which the officers were actually informed of the presence of guns in" the trailer. It recognized "that the transmission of collective knowledge between investigating and arresting officers is crucial to the success of law enforcement."[34] In any event, the mere presence of guns does not automatically justify a protective sweep. The Court noted that "common sense suggests that an overwhelming amount of law abiding citizens in Kentucky have guns in their homes for lawful purposes. In other words, Brumley's rights under the Fourth Amendment cannot be diminished simply by exercising his rights under the Second Amendment." With respect to the assertion of noise, the Court agreed that:

> A midnight knock at one's home and the arrest of a person living there could hardly go unnoticed by fellow residents. It strains credulity to think other persons who may be residing in the home—especially family members and loved ones—are not going to be stirring inside with at least some interest and most likely alarm. If noise inside the home of an arrestee provides reasonable suspicion for a protective sweep, then there would conceivably be reason to sweep almost every house where there is more than one member of the household. Buie requires something more. Many, if not most homes in Kentucky, harbor multiple occupants—including pets. Our analysis requires facts reasonably demonstrating that Brumley's home harbored not just an additional individual, but rather an "individual posing a danger to those on the arrest scene."

Further, it agreed that even the earlier cases required something more than just there was someone else present, but that the presence just be a threat. Further, the absence of evidence, that someone might be present, is not justification for a sweep. The Court looked at several cases for guidance, noting that in some, the officers had "reasonable suspicion that potentially dangerous criminal accomplices may have been present." Brumley's warrant for possession of controlled substances did not suggest accomplices.

> Further, the Court questioned that "it hardly seems "reasonable" for them to be ordered into a darkened house where they could become easy targets for anyone wishing to do them harm from within the blackened confines" The court noted "an attentive departure from the premises with their prisoner would surely have been safer than an invasion of the home."

The Court continued:

> We certainly do not seek to diminish the legitimacy of law enforcement officers' concern for their personal safety. We have always endeavored to keep the safety

[33] U.S. v. Colbert, 76 F.3d 773 (6th Cir. 1996) (emphasis in original).
[34] U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012); see also U.S. v. Hensley, 469 U.S. 221 (1985).

> concerns of officers foremost in our minds when engaging in this delicate balancing of constitutional proscriptions. But even prior to the U.S. Supreme Court's decision in Buie, this Court recognized that mere apprehension cannot serve as a pretext for breaching the search warrant requirement.[35]

The Court noted that "reasonable suspicion is a very low threshold," [but] "it is not a carte blanch for law enforcement officers to dispense with the search warrant requirement."

The Court reversed the decision denying suppression of the evidence located during the sweep, and remanded the case for further proceedings.

SUSPECT ID

Williams v. Com., 2013 WL 6210255 (Ky. App. 2013)

FACTS: On July 1, 2011, Williams was caught by security cameras, having broken into a residence in Fort Mitchell. He stole jewelry. He was also identified as having been part of another residential burglary a few hours earlier. Prior to his scheduled trial, the prosecution gave notice that it intended to introduce "prior bad acts" evidence related to his attempt to break into yet another home, in Fort Thomas (Campbell County). He was captured by security cameras at that time and also confronted by the homeowner, and was wearing the same clothing (an Urban Active uniform) with an ID lanyard, as he was wearing in the Fort Mitchell break-in That ID helped identify him, as did a neighbor who'd made note of his license plate.

After much discussion, it was noted that failing to admit the Fort Thomas information would "make it appear as if police identified Williams out of nowhere." In fact, he admitted he was the individual in the Fort Thomas incident, "but he claimed he was not there to commit a burglary but was forcing his way in to open a gym membership. (He did, in fact, work at Urban Active, but had supposedly left early.) During subsequent testimony, the Court cautioned the Commonwealth to be careful in its questioning because of the risk of overstepping "prior bad acts" limitations. The Court also carefully instructed the jury on the issue, which was that they could not use testimony relating to the Fort Thomas incident to convict him in the Fort Mitchell case.

Williams was convicted of Burglary 2nd and appealed.

ISSUE: May similar crimes be introduced against a defendant at trial?

HOLDING: Yes

DISCUSSION: Williams argued it was improper to introduce KRE 404(b) evidence (of other crimes, wrongs or bad acts) of the Fort Thomas uncharged incident against

[35] Com. v. Johnson, 777 S.W.2d 876 (Ky. 1989).

him. Proving relevance falls to the prosecution. In this case, the evidence went to modus operandi and begins with the "simple logical precept" that "two strikingly similar crimes were probably committed by the same person." The Court agreed that the two situations were similar enough that it was proper to admit evidence of the one against the other. In such situations, the Commonwealth was permitted to "present a complete, unfragmented picture of the crime and investigation." Not allowing the testimony may have left the jury wondering how Williams had been identified as a suspect. The admonition was sufficient to prevent misuse of the evidence by the jury.

Williams also complained that Officer Best should not have been permitted to testify about the security video of the Fort Mitchell incident. Although unpreserved, the Court addressed the issue of narrative testimony, pursuant to Cuzick v. Com.[36] Williams claimed the officer's narration went beyond what was permitted, "because some of the observations he made were conclusory in nature" – which infringed upon the jury's duty. The Court found that the error, if any, was harmless.

Williams' conviction was affirmed.

Ashford v. Com., 2013 WL 5886180 (Ky. App. 2013)

FACTS: On September 4, 2010, Burns, highly intoxicated, was stopped by an individual and offered "weed." He declined and another person approached him. Distracted, he turned, only to be brought back to the first individual when he heard the "click of a weapon engaging a round." He was assaulted by multiple subjects. Burns was able to describe the clothing of his assailants, despite his intoxication, because the "assault had a sobering effect." At some point, his assailants stole his pants.

Burns was able to call 911 within minutes. He reported that he'd been attacked by "six black males wearing red and black hoodies" and that they were in a white Cadillac Coupe de Ville. He gave a direction of travel.

Officer Williams (Louisville Metro PD) found a vehicle matching the description less than a mile from the incident, within 15 minutes of the call. He found Ashford and Stokes ducked down in the back seat. He removed them from the car. He found a handgun "under and behind the right rear tire next to the curb" as well. Burns was brought to the scene, after being told that "they were taking him to identify the individuals they had caught." When he saw them on the curb, "without prompting he identified the car and the individuals by their clothes." Both were arrested for Robbery 1st.

The driver of the vehicle was also identified, as it had been loaned to Michael Broughton, who was not identified by Burns and apparently not present at the scene. Stokes said he'd seen Ashford hide the gun. Stokes agreed to plead to Facilitation and testify against Ashford. Ashford was convicted of Complicity to Robbery and stipulated that he was a convicted felon. He was convicted of possession of the weapon as well. Ashford appealed.

[36] 276 S.W.3d 260 (Ky. 2009).

ISSUE: Is a show-up permitted?

HOLDING: Yes (see discussion)

DISCUSSION: Ashford argued that the "show-up identification of him in a red sweatshirt handcuffed next to a white Cadillac was unduly suggestive and thus, created a substantial likelihood of misidentification…." The trial court permitted it, noting that it was "impressed with Burns's recollection of the incident and the identification of Ashford later; and that he freely admitted any limitations on his recollection of events." (The Court noted Ashford's concerns that wearing red and black, on a day when UL played UK, was not an issue with respect to the identification.)

The Court affirmed Ashford's conviction.

Barnes v. Com., 410 S.W. 3d 584 (Ky. 2013)

FACTS: On May 24, 2009, Manning went to a Lexington home to tend to a friend's pets and plants. As she got to the back of the house, she "saw a person inside bending over removing the pole from the base of the door which secured it." She yelled and the person disappeared into the house. She went to the front and found the door unlocked, so she called 911 (along with her friend and her father) and waited for law enforcement. She found damage and that items were missing, and when the friend returned, found additional items were discovered to be missing. A partial print was recovered. Manning gave a specific description of the person she spotted.

The next day, she was shown a photopak; Barnes' photo was not in the set. A couple of weeks later, the investigators spotted a man (Barnes) who looked like the description Manning gave. They took a photo. He was taken to the station but denied having been involved, explaining that he was in the area "looking for friends whose addresses he did not know." Manning was shown a second photo pak, which included Barnes's photo, and she immediately selected Barnes. (There was some disparity in the age she gave, and in his height and facial hair.)

Barnes was convicted of Burglary and appealed.

ISSUE: Is showing a photopak three weeks after a crime permitted?

HOLDING: Yes

DISCUSSION: Barnes argued that the identification process followed by the detectives was improper. The Court noted that the second photopak was shown to Manning three weeks after the crime and that all of the photos were properly selected – it was a "good lineup and nothing imprermissibly suggestive" was included. The Court looked to the overall circumstances under Neil v. Biggers and ruled that she had a clear

view of the suspect from a reasonable distance. The fact that she was shown a larger photo just before trial was not error, either.

The Court upheld his conviction.

Crews v. Com., 2013 WL 6730041 (Ky. 2013)

FACTS: On September 26, 2010, Crews attacked Cutter in a grocery store parking lot in Lexington. He grabbed her purse and they struggled, with Cutter eventually being knocked to the ground. "Refusing to relinquish her purse without a fight, Ms. Cutter and Crews engaged in a tug-of-war, each desperately grasping separate handles of the purse." Eventually, the zipper gave way, the purse opened, and Crews grabbed Cutter's wallet and fled. Cutter suffered minor injuries which were treated at the scene. A witness later identified the robber as Crews.

When credit card charges started appearing, Cutter contacted Det. Sharp, the lead investigator. Surveillance video from the store where the purchases were made showed a man and woman involved. Still photos from the video were broadcast on Crime Stoppers. Citizen callers identified the suspects as Harris (the female) and Crews. Harris admitted she was on the video, and identified her confederate as Crews. (She claimed to not know that the cards she used were stolen.)

Crews was subsequent convicted of Robbery, Complicity to Fraudulent Use of Credit Cards and PFO. Crews was convicted and appealed.

ISSUE: May an improper suspect identification cause the identification to be suppressed?

HOLDING: Yes

DISCUSSION: Crews argued that Cutter's identification of him was tainted "by her exposure to a photo" on the Crime Stoppers segment. She was later given a photo lineup, but she was unable to identify Crews from it. She did identify him from a solo photo, after she was told that the man had been seen "following her around inside the store prior to the robbery." She recognized him from his clothing, apparently. The trial judge sustained the motion, finding the method used to be "unduly suggestive."

At the trial, however, Crews' attorney told the judge he wanted to question her about the photo lineup. The Court warned him that by doing so, he "opened the door for admission of the whole pre-trial identification process." The Court then reversed its ruling and allowed Cutter to identify Crews, which she did by "stating only that she recognized his eyes." Oddly, Crews' attorney did not question Cutter. With respect to the other witness, he had never been shone a photo lineup but had been shown a single photo of Crews prior to trial.

The Court ruled that in neither case did the trial court "conduct the appropriate Biggers analysis" However, the Court ruled any error to be harmless, in the face of all of the other evidence submitted to the jury.

Crews also argued that he had asserted his right to counsel after receiving Miranda. Following the reading of the rights, Crews asked the detective "do you think I need an attorney?" The detective said no and proceeded to interview him. The recording was not played for the jury, the detective instead providing a summary, staying that Crews "admitted some knowledge" of the credit card issues. He provided no incriminating statements about the actual robbery.

The Court stated that "it is obvious beyond question that Crews indeed needed a lawyer," and that it "would defy common sense to believe that" the detective did not know that. The Court noted that in Leger v. Com., it had held that "lying to persons being interrogated in order to induce them to waive their rights under Miranda is not permitted."[37] The Court agreed that any confession would have to be suppressed. But, since none were made with respect to the robbery, there was nothing to suppression. The Court did reverse, however, his conviction on the credit card usage.

In addition, Det. Sharp was permitted testify that the interview was brief and that when he asked about the robbery, "the interview 'turned south.'" When asked what that meant, he said that Crews "just wasn't cooperative and indicated that he didn't want to talk anymore. And when they say that, it's over." Over objection, the statement was allowed to stand, and during the subsequent testimony, the detective "again stated that the interview with Crews became confrontational and that Crews indicated he no longer wanted to talk."

The Court agreed that the Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody." The Court, finding that the comment was not impermissible, however, allowed the statement.

The Court also agreed that Crews' mug shot was properly introduced under the factors outlined in Redd v. Com.[38]

> (1) the prosecution must have a demonstrable need to introduce the photographs; (2) the photos themselves, if shown to the jury, must not imply that the defendant had a criminal record; and (3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

The Court agreed that because of questions related to Crews' appearance at the time of the crime, and as such, it was proper to admit the photo.

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[37] 400 S.W.3d 745 (Ky. 2013).
[38] 591 S.W. 2d 704 (Ky. App. 1979); Williams v. Com., 810 S.W.2d 511 (Ky. 1991).

The Court also noted that the jury was allowed to view the videos in the jury room on the prosecutor's laptop, which was described as "unclean" as it presumably included other information. The jury was admonished not to navigate outside the permitted files. The Court noted that "in a perfect world, all DVDs intended to be introduced into evidence will be converted into a format playable in a clean and regular DVD player available to the jury. But we do not live in a perfect world." The Court agreed that the Court employed proper measures and the jury was correctly admonished.

Finally, the Court noted that robbery does not require an intent to harm, only evidence that physical injury was caused as a result of the theft (or attempted theft). The Court upheld the robbery conviction.

INTERROGATION

Galenski v. Com., 2013 WL 6730018 (Ky. 2013)

FACTS: Galenski was arrested for the shooting death of Smyser, in Hardin County. Galenski was interrogated and showed an emotional response to a mention of his father. The detective also mentioned a possible death penalty. Galenski was allowed to talk to his father and subsequently confessed. He was charged with complicity to Murder and Tampering.

Prior to trial, he moved to suppress the confession and was denied. He was convicted of tampering but the jury failed to reach a verdict on the complicity charge. He was convicted at a second trial and appealed.

ISSUE Is information about penalties coercive?

HOLDING: No

DISCUSSION: Galenski argued that the discussion of "a needle in [his] arm" was "coercive and overbore his freewill." The Court looked to the test for voluntariness as outlined in Bailey v. Com.: (1) whether the police activity was 'objectively coercive'; (2) whether the coercion overbore the will of the defendant; and (3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession." [39] The Court agreed that "truthful, non-coercive advisement of potential penalties" is not coercion. In fact, other evidence suggested that did not have an effect on Galenski, as he was joking about it.

The Court upheld his convictions.

[39] 194 S.W.3d 296 (Ky. 2006); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Baltimore v. Com., 2013 WL 6730040 (Ky. 2013)

FACTS: Jackson and Cole went to a Louisville apartment complex. There Jackson "got into a prolonged fight in the parking lot" with Baltimore. A large crowd watched. Initially "Jackson seemed to be getting the best of [Jackson]." Then, someone gave Baltimore a gun, which he used to shoot and kill Jackson.

Baltimore was charged with Murder. At trial, six witnesses testified they saw the shooting. Baltimore presented no witnesses but denied the murder. He was convicted of Murder and appealed.

ISSUE: Must an invocation of the right to remain silent be respected?

HOLDING: Yes

DISCUSSION: Baltimore argued that the witnesses were all connected to the victim and that their testimony was inconsistent and not credible. The court agreed that bias might be drawn from their relationship to the deceased, but the "[c]redibility and weight of the evidence are matters within the exclusive province of the jury."[40]

With respect to the investigation, Baltimore had turned himself in once an arrest warrant was issued. He was given Miranda but refused to sign the form. He told the detective that he "had *nothing to say*" about the shooting. He later said he had nothing to do with it and wasn't present. The interview continued and several times he said he had "nothing to say." The trial court had admitted this colloquy. The Court noted that the ruling that he "did not invoke his Miranda right to remain silent with his statement that 'he had nothing to say' conflict with the essential holding of the Miranda decision." The Court agreed that his statement was sufficient to invoke the right to silence. When the error if "of a constitutional magnitude, reversal of the conviction is required unless it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[41] In this case, the court noted that since six witnesses all said he did it, and there was no alternative perpetrator evidence put forth, the error was, in this case harmless.

Baltimore's conviction was affirmed.

Smith v. Com., 410 S.W.3d 160 (Ky. 2013)

FACTS: On September 18, 2009, at about 11 p.m., Smith rode his horse to the Rigney home in Wayne County. There, he found the Rigneys (Jonathan and Samantha), along with their two small children, Gabe and Jazzlyn. Samantha's cousin, Conn and her son were also there. All were seated on the front porch. As he approached, Smith pulled a gun and started shooting. The residents sought cover but Samantha was mortally wounded.

[40] Com. v. Smith, 5 S.W.3d 126 (Ky. 1999).
[41] McGuire v. Com.,, 368 S.W.3d 100 (Ky. 2012); Chapman v. California, 386 U.W. 18 (1967).

Wayne County deputy sheriffs immediately went to the Smith home. His wife said he was not home but gave consent to search the property. They found the horse, with two beers in the saddlebag, but they did not find Smith. His wife was told to have him call when he returned. An hour later, Smith did so. They returned and told him they wanted to question him about the shooting – he stated "that if he had shot somebody he could not remember doing so." He was taken to the Sheriff's Office for questioning. It was undisputed that he was intoxicated at the time.

Smith was given Miranda warnings and admitted that he'd gone to the Smith home, apparently in response to believing Jonathan had stolen property from Smith's brother. He claimed to have set off a large firecracker, but then changed his story, stating that Jonathan had pointed a rifle at him. His story flip-flopped, but he "steadfastly maintained that he did not shoot anyone."

At trial, as a result of his claim, the jury was given a self-defense instruction. However, he was convicted of Murder and multiple counts of Wanton Endangerment. He appealed.

ISSUE: Does intoxication negate an interview?

HOLDING: No

DISCUSSION: First, Smith argued that his interview should have been suppressed because he was "so intoxicated at the time of the interview that his statements were not knowingly, willingly and voluntarily made." The Court, however, noted that "generally speaking, no constitutional provision protects a drunken defendant from confessing to his crimes." In Britt v. Com., the Court noted that '[i]f we accept the confessions of the stupid, there is no good reason not to accept those of the drunk."[42] The Court that there were two situations in which a level of intoxication might become a factor: when it affects the amount of police coercion needed to overcome the will of the subject and when the subject was "intoxicated to the degree of mania" or was "hallucinating, functionally insane, or otherwise 'unable to understand the meaning of his statements'" – making it unreliable. Neither, however, seemed to apply in this situation, as he "freely and knowingly accompanied" the deputies to the station and signed an acknowledgement of Miranda. The Court found no indication that he was so intoxicated as to be "inherently unreliable."

The Court also addressed the issue of the wanton endangerment charges. The court agreed that he fired shots from less than 24 feet away from three adults and three children. When the horse began to buck, he continued firing toward the porch – putting all of the occupants at risk, although he only hit one person.

The Court upheld his convictions.

[42] 512 S.W.2d 496 (Ky. 1974).

RIGHT TO SILENCE

Baumia v. Com., 402 S.W.3d 530 (Ky. 2013)

FACTS: On June 26, 2010, Baumia and Thompson (her boyfriend) attended a party in Louisville. She admitted that she began drinking about 5-5:30 p.m. At about 8 p.m., she got into her car, with an open beer bottle. Thompson got into the passenger said. Baumia said Thompson was angry at being made to leave and began to assault her. Witnesses saw this altercation but did not see an actual assault. They both believed, however, that the "conflict was physical." One witnessed pulled in behind them and called 911, while the other approached on foot. Seeing that witness, Baumia turned back toward the party. She later said she was going to tell her father about Thompson's actions, but when he promised to stop, she again turned around and headed home. Three witnesses saw her run the stop sign and speeding. One said that it sounded like she gave it "all the gas she could." Three children were riding bikes in the neighborhood and one child was struck and thrown almost 70 feet. Baumia then crashed into a home, damaging two vehicles and the garage.

Sgt Howell (Louisville Metro PD) tried to question Baumia, but found her "unresponsive, unsteady on her feet, smelled of alcohol, and that her eyes were glassy." He believed her to be intoxicated. EMTs who transported her said she was "belligerent and smelled of alcohol" and admitted to having had a "couple of drinks." She admitted the same to a nurse and a doctor.

Officer Van Cleave, who met Baumia at the hospital asked her to take a PBT. She refused and he immediately got a search warrant. After the samples of her blood were taken, she was released. Dr. Smock later testified that he believed her blood alcohol was between .23 and .26 when she struck the child, and that she would have had to drink almost 8 beers to get to that level. She later admitted to having had six and that she was under the influence.

The child died the next day. Baumia was eventually convicted of murder, Wanton Endangerment 1st, Criminal Mischief and DUI. She appealed.

ISSUE: Should *any* mention of someone invoking a right of silence be avoided, no matter how worded?

HOLDING: Yes

DISCUSSION: Prior to the trial, Baumia had sought exclusion of Officer Van Cleave's testimony concerning her invocation of her right to remain silent. (Specifically she said "My father told me not to talk to the f----n' police, see my attorney.) The trial court ruled that she was not in custody at that time and denied the motion. The Court also denied a trial motion to Sgt. Howell's comment on her "silence when explaining her demeanor after the collision." The court reviewed each, in term.

With respect to Officer Van Cleave's statement, the Court ruled that it was improper to permit the testimony regarding her "pre-custody, pre-Miranda invocation of her right to remain silent." The Court agreed that although her statement wasn't ideal, it "was effective."

The Court looked to the pre-Miranda case of Griffin v. State of California, which stated "that the Fifth Amendment … forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[43] However, since that time, "the admissibility of a suspect's silence has been discussed with reference to Miranda." However, in Jenkins v. California, the Court had held that the "pre-arrest, pre-Miranda silence may be used for impeachment and not run afoul of the Fifth Amendment or due process."[44] Post-arrest, pre-Miranda silence might also be used in impeachment.[45] However, in Doyle v. Ohio, the court had held "that impeachment through the use of post-arrest, post-Miranda silence does indeed violate due process." The issue in this case, however, whether a subject's "pre-arrest, pre-Miranda silence may be utilized in the Commonwealth's case-in-chief."

Looking to the Kentucky Constitution, the Court noted that in Green v. Com.,[46] the "giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right." It "exists whether or not the warning has been or is ever given." The court noted, however, that both Kentucky's Constitution and the Fifth Amendment "state that an individual cannot be 'compelled' to incriminate herself." As such, some form of "official compulsion must be present in order for the privilege against self-incrimination to attach." The Court then moved on, asking "whether an individual may be officially compelled outside of a custodial setting."

The Court concluded that although the fact that she refused to submit to the test is admissible, the "phrasing and language employed … was not indicative of guilty and was both irrelevant and unduly prejudicial." As such, the statement should not have been introduced. However, the Court agreed that in the face of the entire case, especially the overwhelming evidence of her guilt, it was harmless error.

With respect to Howell's comment, that "Baumia didn't want to talk," again, the Court agreed it was error. However, "the prejudicial effect of Howell's testimony concerning [Baumia's] desire not to speak with him shortly after the accident [was] minimal." As such, the error did not warrant exclusion.

The Court also looked at the introduction of a video taken from a police vehicle. Officer Bassler, who responded, was running his video as he approached the scene, following essentially the same route as Baumia from her father's house, where the party was, to the crime scene. The video was relevant, the Court agreed, because he "offered a more accurate description of the crime scene than what could be depicted by the

[43] 380 U.S. 609 (1965).
[44] 447 U.S. 231 (1980).
[45] Fletcher v. Weir, 455 U.S. 603 (1982).
[46] 815 S.W.2d 398 (Ky. 1991).

witnesses' testimony." It also "showed the residential nature of the neighborhood, including the presence of several stop signs located in the area," as well as the "weather conditions on the day of the collision – illustrating it occurred on an evening in which there would have been no issue with [Baumia's] visibility." Although certainly prejudicial, as all crime scene photography would be, it did not substantially outweigh the probative value.[47]

The court then looked at the admission of the 911 call, made by one of the witnesses. It was admitted and played to the jury over the defense's objection. The Court agreed, however, that it provided a timeline, and also "gave the jury a more accurate description of what actually happened rather than just the recollections provided from those who were present that day."

Finally, the Court reviewed the admission of witness testimony as to Baumia's consistent use of profane language after the crash. Even if it was error, however, the Court ruled it to be harmless.

Baumia's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE - RECORDINGS

Townsend v. Com., 2013 WL 6158468 (Ky. 2013)

FACTS: Tate, a KSP CI, had worked with Det. Clark on three controlled buys involving Townsend in Boyd County. In each, he bought Oxycodone for cash. Each was recorded and Det. Clark was with him during two of the transactions. At trial, the audio recordings were played, "buttressed by the testimony of both."

Townsend was convicted for three counts of Trafficking 1st. He appealed.

ISSUE: Is some explanation permitted with respect to recordings?

HOLDING: Yes

DISCUSSION: During the recordings, apparently, Townsend told Tate "not to mention money during the first drug transaction." Tate was permitted to explain that "it would make recording the transaction more difficult and that Townsend requested that hand signals be used instead of verbal articulations of money." The Court agreed that it was relevant under KRE 401 because "none of the three recordings of the transactions has an easily identifiable expression of the terms of the illicit drug transaction that was taking place."

Further, although Tate framed his response in such a way that he appeared to be speculating on the reason for Townsend's order, the evidence indicated that Townsend

[47] See KRE 403.

had, in fact, previously explained it to Tate. Since Tate had personal knowledge, his testimony was admissible.

Townsend's convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE – PHOTOS

Mooney v. Com., 2013 WL 6729909 (Ky. 2013)

FACTS: During Mooney's trial for Murder in Hopkins County, two photos of the victim's body were admitted. They showed the victim's "mouth being held open by a person wearing protective gloves."

Mooney was convicted and appealed.

ISSUE: Are gruesome photos still admissible?

HOLDING: Yes

DISCUSSION: Mooney argued that the admission of the photos was "unduly prejudicial." The Court noted that "the nature of certain crimes carries with it gruesome descriptions, images, videos, testimony, or other illustrative evidence that may be difficult to view." However, such photos are admissible to prove an element of a crime. Since the photos were "useful in showing the patch of the bullet that killed" the victim, a gunshot through the open mouth, which was, in fact, the cause of death, they were admissible.

The Court upheld Mooney's conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR ALLEGATIONS

McCane v. Com., 2013 WL 6157120 (Ky. App. 2013)

FACTS: McCane was married to M.C.'s paternal grandmother. In April, 2008, M.C. reported that McCane had "engaged in inappropriate sexual conduct with her." Her stepmother called the Trimble County authorities and a rape kit was performed, but no definitive evidence was located. McCane was interviewed multiple times and finally admitted to raping M.C. Following the indictment, M.C. came forward with additional allegations, claiming that the abuse began in 2002, when she was 8, and continued until the 2008 allegation. Eventually, McCane was charged with multiple counts of Rape 1st and Sodomy 1st (when M.C. was under 12) and Rape 2nd, along with varying other charges. (The original charge was subsumed into the new indictment.)

Prior to trial, McCane argued that he should be allowed to introduce evidence that M.C. had accused her paternal grandfather of similar acts, for which he'd apparently been acquitted. Although the evidence was excluded, a question posed by the defense

brought the issue to the jury's attention, and ultimately, a mistrial was granted. At his second trial, McCane was only convicted of Rape 1st and Sexual Abuse 1st for the conduct alleged in April, 2008.[48] McCane appealed.

ISSUE: Are prior allegations that the victim has accused others of similar crimes admissible?

HOLDING: No (but see discussion)

DISCUSSION: McCane argued first that he should have been allowed to attack M.C.'s credibility with the evidence of similar allegations against her grandfather. Usually, KRE 404(a) does not permit such evidence. However, under KRE 608 it might be allowed, if the Court concluded that "the specific instances are probative of truthfulness or untruthfulness." But, when the credibility involves a criminal sexual act, KRE 412 (the Rape Shield) controls. That provision does not apply when the evidence is "'demonstrably false' allegations of prior abuse." In this case, the trial court did not find that the allegations were, in fact, "demonstrably false," and the appellate court upheld that decision.

Further, the Court noted, his only convictions involved instances to which McCane had confessed. The Court upheld his convictions.

TRIAL PROCEDURE / EVIDENCE – TRIAL PROCEDURE

Allen v. Com., 2013 WL 5777036 (Ky. 2013)

FACTS: The two victims, Tammy (age 10) and Janet (age 8), were left primarily with Allen, their father, when their mother quit the family in 2002. While visiting their mother, however, that fall, they alleged that Allen has forced them to watch pornography and had sexually abused them. They were removed from his care and given to their mother, but returned to him in 2003 after they recanted their allegations. They lived with him until 2005, when they were placed with a paternal aunt. Eventually, Tammy returned to her father in 2006, although Janet did not.

In July, 2006, Porter, Allen's girlfriend, reported she'd seen Allen in a "sexually inappropriate position with Tammy." CHFS moved Tammy from the house. During the subsequent investigation, the girls reiterated the 2002 allegations and Tammy admitted sexual activity more recently, in 2006.

Allen was indicted on charges of Sexual Abuse, Sodomy, Incest and Attempted Rape (of Tammy). He was tried 4 times, and eventually, was convicted. He appealed.

ISSUE: Is a defendant entitled to "fully examine" every witness?

[48] Although M.C. was over 12 at that time, the case proceeded under the under-12 standard.

HOLDING: Not necessarily

DISCUSSION: Allen argued that he was kept from fully examining Porter as a witness (when she was cautioned by the Court about her self-incrimination rights with respect to drug use), but the Court noted that he was free to, and did, cross-examine her with respect to a number of other issues that "went to her credibility."

Allen also objected to Tammy referencing, in response to a question, that he was in jail at the time. The Court agreed that although error, it was harmless, and the comment was spontaneous and not as a result of a direct question. (She was apparently using it to set up a timeline as to what had occurred in 2006.)

Allen also argued that Reynolds, a CHFS investigator, testified in a way that bolstered that testimony given by the girls. The Court allowed her to testify as to the allegations to which she was responding. She did not relate specifically, however, what the girls told her in response to questioning or commented on whether she believed that abuse had occurred, which the Court agreed was permitted.

Finally, the Court agreed it was not improper to allow Tammy's allegations of sexual abuse against other parties, noting that nothing indicated that the allegations were false. She had been questioned about the allegations in the earlier trials and denied having made such allegations, but the Court did not equate that to making false allegations.

The Court upheld Allen's convictions.

TRIAL PROCEDURE / EVIDENCE – PRIOR CONSISTENT STATEMENTS

McClendon v. Com., 2013 WL 5521957 (Ky. App. 2013)

FACTS: On September 29, 2007, McClendon allegedly engaged in sexual contact with his victim in Kenton County. He did not deny it, stating instead that they engaged in sex in exchange for drugs, but that he hadn't given her any drugs. The victim alleged that he lured her into a side yard saying he needed a ride and forced her into oral sex. At trial, the victim testified, along with a SANE. The Commonwealth moved to put the nurse's report into evidence, it was allowed even though it was hearsay, under the exception that the statements were made for the purposes of medical treatment. The nurse "went on to testify regarding the victim's injuries and read directly from her report's narrative of the victim's account of the incident."

McClendon was convicted and appealed. At an earlier proceeding, he argued that it was error for the trial court to permit the nurse "to read the victim's prior consistent statements, thereby bolstering her testimony." The Court agreed that it was error, but found that it did not substantially sway the jury and upheld the conviction. McClendon moved for the conviction to be vacated because of ineffective assistance of counsel. That was also denied and he further appealed.

ISSUE: Are prior consistent statements made by a witness admissible?

HOLDING: No

DISCUSSION: McClendon argued that his counsel "unreasonably failed to object to the admission of Merten's report and her reading from the report on the stand." The Court agreed that "a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony."[49] The Court noted that trial counsel had, in fact, objected several times and was overruled. Although error, the Court found it to be harmless.

In addition, McClendon argued that evidence suggested the victim was a prostitute was not admitted in the trial, and as such, he was not given the opportunity to rebut her claim about the encounter not being consensual. The Court noted that under KRE 412(a), "evidence offered to prove that any alleged victim engaged in other sexual behavior" or "evidence offered to prove any alleged victim's sexual predisposition" is not admissible. His specific reason for seeking the admission did not meet any exception, either.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

McAtee v. Com., 413 S.W.3d 608 (Ky. 2013)

FACTS: On July 9, 2009, Haskins was murdered in front of Beals's Louisville home. Beals was interviewed by Det. Trees (Louisville Metro PD) four days later and she related everything she'd seen. She identified the shooter as YG, who she knew from the neighborhood. Kilgore, Beals's neighbor, who had been with Beals at the time, was interviewed as well, and also identified the person involved in the altercation as YG, although he did not witness the actual shooting. He identified McAtee as YG in a photopak.

McAtee was indicted for Murder and Tampering with Physical Evidence (for leaving the scene with the gun). At trial, both Beals and Kilgore claimed to have no memory of the events. Beals denied even having spoken to Det. Trees. Kilgore, at least, remembered Det. Trees, but recalled nothing of the interview or of having made the identification. Det. Trees was allowed to impeach both witnesses using the statements they'd provided to him, including a recording of Kilgore's interview.

McAtee was convicted and appealed.

[49] Smith v. Com., 920 S.W.2d 514 (Ky. 1995); Dickerson v. Com., 174 S.W.3d 451 (Ky. 2005).

ISSUE: May prior statements be introduced when the subject claims no memory of them?

HOLDING: Yes

DISCUSSION: With respect to the statements introduced by Det. Trees, Under KRE 801A(a)(1), "a statement is inconsistent … whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it."[50] Such "prior inconsistent statements may be introduced as an impeachment device and as substantive evidence."[51] The Court agreed that both statements qualified as "testimonial" pursuant to Crawford v. Washington[52] because there was no "ongoing emergency" and the "primary purposes of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The Court stated the question is "whether despite his memory loss, an amnesic witness 'appears at trial' to the satisfaction of the Confrontation Clause."[53] It noted that the Confrontation Clause only guaranteed an *opportunity* for cross-examination. The Court agreed that Crawford did not overrule Owens, which held that a witness appears when they "willingly take the stand, answers questions in whatever manner …."[54] The Court agreed it was proper to allow Det. Trees to testify as to what Beals and Kilgore said to him.

The Court also addressed the tampering charge and noted there was no evidence that McAtee had done anything to deliberately conceal the gun by placing it in an unconventional location. (The Court noted that the police had only searched for the gun at the scene of the crime, some months later.) The court agreed that under Mullins v. Com., simply leaving with a gun is not enough to trigger a Tampering charge.[55] The Court reversed that charge.

In addition, Dets. Willett and Lesher testified about their interrogation of McAtee. He had argued that since they admitted some of the recording of the questioning – the "rule of completeness"[56] required that the entire recorded statement (three hours) to played for the jury. However, the Court concluded that in this case, McAtee was trying to get his entire statement (in which he maintained his innocence) before the jury without being subjected to cross-examination. The court ruled, however, that defense counsel was "quite successful in exposing police interrogation techniques for their confession-inducing qualities" even without the entire recording being provided to the jury.

On an unrelated note, during deliberations, the jury asked to review Kilgore's recorded statement and were provided with the DVD and a standard DVD player. However, the DVD player would not read the disc. At that point, the judge asked the prosecutor to

[50] Brock v. Com., 947 S.W.2d 24 (Ky. 1997).
[51] Jett v. Com., 436 S.W.2d 788 (Ky. 1969).
[52] Crawford v. Washington, 541 U.S. 36 (2004).
[53] McIntosh v. Com., (2008)
[54] U.S. v. Owens, 484 U.S. 554 (1988)
[55] 350 S.W.3d 434 (Ky. 2011).
[56] KRE 106

"provide a 'clean' computer" to use. The prosecutor did so, and also notified defense counsel that the request had been made. The Court agreed this process was in error, but held it to be harmless, because sending back the DVD was "akin to sending a witness back to the jury room."[57] (An alternative proper way to do this would be to call all parties back to the courtroom and allow the jury to view it in that setting, instead.) The defendant's actual confession, however, is always admissible.

The Court reversed the Tampering conviction but affirmed the Murder conviction.

TRIAL PROCEDURE / EVIDENCE – JURY

McGaha v. Com., 414 S.W.3d 1 (Ky. 2013)

FACTS: McGaha and Cowan were neighbors in Adair County, and engaged in a "series of disputes." Most recently, Cowan objected to a light on McGaha's storage building that "annoyed him." When police arrived in response to a complaint, "Cowan and his wife became belligerent" and were arrested. The next day, Cowan was out riding on his ATV when he encountered McGaha. McGaha "steered directly into [Cowan's] ATV without braking," knocking Cowan off the vehicle and causing a serious, likely fatal, injury. Moments later, McGaha then shot Cowan in the head with a shotgun.

McGaha was charged with Murder. He admitted he killed Cowan, but claimed self-defense. He presented evidence "of Cowan's threats, harassment, and intimidation toward" McGaha and his family. He also testified that Cowan had pointed a gun at his on a previous occasion, that he knew Cowan had a gun with him on the ATV and that he pointed it at McGaha that day. McGaha claimed that he rammed the ATV because of that. Further, he stated that he demanded Cowan show his hands, as he lay on the ground, and that Cowan made verbal threats. He shot him in response to a perceived threat.

McGaha was convicted, and appealed.

ISSUE: Does being a Facebook friend require someone to be excluded from a jury?

HOLDING: No (but should be disclosed)

DISCUSSION: McGaha argued that one of the jurors failed to disclose that "she was a Facebook 'friend' of the victim's wife." The juror had admitted that she casually knew some of the Cowan family, but that they weren't close. No question was asked about "any social media relationship[s]." (The juror had 629 Facebook friends.) The court agreed, however, that her disclosure was responsive to the question asked and was truthful. McGaha could have asked additional questions of the juror but chose not to do so.

[57] See Berrier v. Bizer, 57 S.W.3d 271 (Ky. 2001).

The Court agreed that "it is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonable be presumed."[58] Further, "[F]riendships' on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire."

The Court affirmed McGaha's conviction.

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

Johnson v. Com., 405 S.W.3d 439 (Ky. 2013

FACTS: During her trial for child abuse and murder, Johnson argued it was improper to allow the prosecution to play recordings of three interrogations by Det. Allen over the course of the two days following the child's death. The recordings included statements by the detective to the effect that she was lying, and suggestions that he believed the story of another party more than hers. Johnson was convicted and appealed

ISSUE: Is it proper for one witness to be asked to give an opinion about the truth of another's testimony?

HOLDING: No

DISCUSSON: The Court agreed that it **"**has long been the law of this Commonwealth that a "witness's opinion about the truth of the testimony of another witness is not permitted .... That determination is within the exclusive province of the jury."[59] However, it agreed that "Technically speaking, however, when an officer makes statements during an interview accusing a person of lying, neither the officer nor the person is a witness at that time." The Court looked to Lanham v. Com., in which it had previously "held that such statements are admissible."[60] When a recording is played, however, the proper action to take is "for the trial court to supply an admonition, in order "to inform the jury that the officer's comments or statements are offered solely to provide context to the defendant's relevant responses." Following the recording, the detective was asked to give his opinion as to the meaning of several of Johnson's statements, The Court agreed that his opinions were not relevant, but did not find that it was unjust for it to have been given to the jury.

With respect to comments he made that arguably bolstered the testimony of another witness, the Court agreed that "The law in the Commonwealth is clear that "a witness

[58] Sluss v. Com., 381 S.W.3d 215 (Ky. 2012).
[59] Moss v. Com., 949 S.W.2d 579 (Ky. 1997).
[60] 171 S.W.3d 14 (Ky. 2005),

may not vouch for the truthfulness of another witness."[61] The court, however, noted that his statement "merely indicated that only one of the two stories [Johnson] told was consistent with Will Callahan's testimony."

The court affirmed her convictions.

WORKERS' COMPENSATION

KSP v. McCray, 2013 WL 5864401 (Ky. App. 2013)

FACTS: In April, 2012, Trooper McCray (KSP) filed a report of injury form indicating that he suffered psychological trauma and severe PTSD as a result of an officer-involved shooting in 2009, in which he'd killed a man. He was not physically injured during the incident." The administrative board ruled that whether he'd suffered a compensable issue was the contested issue. McCray testified as to the distress he'd suffered following the shooting. He agreed he has suffered no physical injury, but stated he stopped working in 2010 because of rage and anger issues related to the event. His psychologists testified as to his total disability. The ALJ looked to KRS 342 and ruled that a compensable injury required some physical trauma and a "harmful change in the human organism that is evidenced by objective medical findings." Psychological harm must result from physical trauma. McCray appealed the ruling to the Workers' Compensation Board, which vacated and remanded the matter, with the Board ruling that an "injury" under KRS 342.0011(1) does not require physical contact.

The KSP appealed.

ISSUE: Is PTSD a compensable injury in Kentucky?

HOLDING: No

DISCUSSION: The Court looked to the statute and agreed that it was "clear from the plain and unambiguous language that an 'injury' for purposes of KRS Chapter 342" requires an actual physical injury, and a claim for any psychological trauma must be as a "direct result of a physical injury." As McCray "candidly acknowledged" that he suffered no physical injury. As such, his psychological trauma could not be compensated under KRS 342. The decision of the WCB was reversed.

NOTE: In a strong concurring opinion, the Court noted that this situation is a "patent disgrace" and "cries out for a statutory revision."

[61] Stringer v. Com., 956 S.W.2d 883, 888 (Ky. 1997).

MISCELLANEOUS

Arevalo v. Com., 2013 WL 5603597 (Ky. App. 2013)

FACTS: Arevalo, a Mexican national, was tried and convicted of intentional murder in Fayette County. He sought post-conviction relief, arguing his counsel was ineffective on a number of issues, including the failure to inform him of his right to have the Mexican consulate notified of his detention.

ISSUE: Must Vienna Convention issues be raised in the direct appeal?

HOLDING: Yes

DISCUSSION: Arevalo's attorney agreed that he had never spoken to his client about the Mexican consulate and was unaware if anyone else had done so. The Court noted that since the issue was just being brought up in the context of an ineffective assistance of counsel claim, it was not raised at the proper time. The Court noted that "allegations against the police and the trial court," including claims under the Vienna Convention, must be raised on direct appeal, not collateral appeal.

The Court affirmed his conviction on all issues.

Com. v. Morris, 2013 WL 5604670 (Ky. App. 2013)

FACTS: Morris had previously leased an office, vacating it in 2009. In 2011, after it was leased to another tenant, Morris asked the owner about a large desk he'd left behind. The owner stated she assumed it had been abandoned but would ask the new tenant. On June 20, however, the tenant called the owner and reported something had entered the office and taken the desk, leaving belongings on the floor. Morris's employee confirmed that he'd entered the building using a key he'd retained and removed the desk. The key was retrieved by the owner and Morris was charged with Burglary and Criminal Mischief.

At trial, the Mason Circuit Court concluded that the Commonwealth couldn't prove its case and dismissed it. The Commonwealth appealed.

ISSUE: May a judge dismiss a criminal case before trial?

HOLDING: No

DISCUSSION: At trial, the Court had dismissed the case because it found no crime in Morris retrieving an item that allegedly belonged to him – as the Commonwealth had not proven the item belonged to anyone else. The Court agreed that pursuant to RCr 9.64, only the Commonwealth may elect to dismiss a criminal complaint before trial, and that the trial court may only dismiss a case through directed verdict following the prosecution's presentation of its case.

The Court reversed the trial court and remanded the case for further proceedings.

SIXTH CIRCUIT

FELON IN POSSESSION

U.S. v. Tapplin, 2013 WL 5604670 (6th Cir. 2013)

FACTS: Police were searching for Tapplin to question him concerning an unrelated matter. They found him and discovered he had five bullets in his pocket. He "explained that he had found the bullets on the ground just moments before and had picked them up as a precaution to protect innocent children playing nearby."

Tapplin, a felon, was charged with possession of the ammunition. He sought to present the affirmative defense of justification. The district court denied it. Tapplin took a conditional guilty plea and appealed.

ISSUE: May a felon in possession of a firearm/ammunition raise the affirmative defense of necessity?

HOLDING: Yes

DISCUSSION: The Court looked to the five elements that must be met for a convicted felon to raise the affirmative defense:

1. That the defendant, or a third party, was under a 'present, imminent, and impending,' threat of death or serious bodily injury;
2. That the defendant had not recklessly or negligently placed himself in the situation;
3. That the defendant had no reasonable, legal alternative to violating the law;
4. That a direct causal relationship existed between the criminal action taken and the avoidance of the threatened harm; and
5. That the defendant did not maintain possession any longer than necessary.

The Court agreed that the children were not actually at a present, serious risk due to the bullets, as there was no indication that the children were even aware of the bullets or able to make use of them. The Court agreed that the defense of justification was not available to Tapplin and upheld his plea.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Vanderweele, 2013 WL 5992131 (6th Cir. 2013)

FACTS: On July 28, 2010, an informant told Agent Petschke (ATF) that he'd seen Vanderweele with a pistol and silencer some 4-5 months earlier, at a Michigan motorcycle club. The agent learned that Vanderweele had three .22 pistols, but no silencer, in his name. He sought a search warrant for Vanderweele's home. During

the subsequent search, the team found four silencers, three handguns and related items. Some of the items, including one silencer, were found under Vanderweele's bed.

Vanderweele was eventually indicted for possession of unregistered silencers under 26 U.S.C. §5861(d). His motion to suppress denied, he took a conditional guilty plea and appealed.

ISSUE: Is it presumed that weapons or ancillary items purchased some time before will remain in a suspect's possession?

HOLDING: Yes

DISCUSSION: Vanderweele argued that the search warrant did not provide probable cause for the search because it relied upon a statement that the silencer was in his possession as many as 7 months before the search and because it did not show a nexus to his home. The issuing magistrate had reviewed the warrant for staleness under the factors outlined in U.S. v. Abboud: that the home was his permanent home for the entire duration of the time in question, that possession of a silencer was much like a gun and an item someone would be likely to continue to possess once purchased, and was well within the time frame other courts had approved.[62] Further, the Court agreed that nexus was satisfied, because "firearms, ammunition, and related items are commonly stored within the owner or possessor's dwelling."[63]

The Court agreed that the magistrate's analysis was sufficient and upheld the warrant.

SEARCH & SEIZURE – TERRY FRISK

U.S. v. Tillman, 2013 WL 6038230 (6th Cir. 2013)

FACTS: On February 27, 2012, Deputy Delaney (Boyd County SO) stopped Tillman for not wearing a seat belt. In fact, Tillman was behind Delaney at a stop light and Delaney was already suspicious of the vehicle (which belonged to Tillman's girlfriend) as it has factored into other stops in the jurisdiction.

As he pulled over the vehicle, Delaney saw Tillman reach over into the front passenger side of the vehicle. He was concerned that Tillman, who leaned over a second time, was reaching for a weapon. Delaney drew his weapon as he got out of his vehicle but kept it out of Tillman's view. He saw that Tillman did not have any documents in his hands (another possible reason for his reach toward the passenger side) so Delaney had Tillman place his hands on the steering wheel. Tillman complied but then reached into his left pants pocket. Delaney asked about drugs or weapons in the car and saw that Tillman was sweating heavily, despite the temperature being 55 degrees. Tillman again moved his left hand out of sight.

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[62] 438 F.3d 554 (6th Cir. 2006).
[63] See U.S. v. Smith, 182 F.3d 473 (6th Cir. 1999).

Delaney ordered Tillman out and frisked him. He found a number of items, including 4 oxycodone pills, brass knuckles, a large amount of cash and a cell phone that included incriminating text messages. Tillman was arrested for the drugs and the concealed weapon. A search warrant was used to further search the car; cocaine, a loaded firearm and a large amount of money were found.

Tillman moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is the refusal to obey an order to keep one's hands in sight important in determining whether a frisk is appropriate?

HOLDING: Yes

DISCUSSION: The Court agreed that the traffic stop was legitimate and based on a valid traffic offense. Even if it was a pretext, the officer's subjective intentions were irrelevant.[64]

With respect to the frisk, the Court agreed that "to proceed from a stop to a frisk, an officer must have a reasonable suspicion that the person to be searched is armed and dangerous."[65] The Court agreed that Deputy Delaney had sufficient cause to support a frisk, given his observations and interpretations for Tillman's behavior. The Court gave "significant weight" to Tillman's refusal to "heed Delaney's instruction to keep his hands on the steering wheel."[66] His nervousness was also a factor.[67] Deputy Delaney articulated well that he was concerned about the possibility, even likelihood, that Tillman had a weapon. Further, furtive motions to reach under a seat can also create reasonable suspicion for a Terry frisk.[68] Although a certain amount of nervousness is to be expected, an officer may use their training and experience to judge how much is too much.[69] Finally, Tillman was driving a vehicle that belonged to a known drug dealer.

The Court agreed it was proper to deny the motion to suppress.

SEARCH & SEIZURE – EXIGENT CIRCUMSTANCES

U.S. v. Evans / Dunn, 2013 WL 6620469 (6th Cir. 2013)

FACTS: In the fall of 2008, the FBI investigated several similar armed robberies in Memphis. Investigator Bartlett (Shelby County, TN, SO) worked with the FBI on the case. He had local TV stations broadcast some of the surveillance footage. One tip led them to Dunn and Jones; Jones was identified from a photo array. Another tip specific

[64] U.S. v. Shank, 543 F.3d 309 (6th Cir. 2008).
[65] See Joshua v. DeWitt,341 F.3d 430 (6th Cir. 2003).
[66] See Adams v. Williams, 407 U.S. 143 (1972).
[67] U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000).
[68] U.S. v. Graham, 483 F.3d 431 (6th Cir. 2007); U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).
[69] See U.S. v. Mesa, 62 F.3d 159 (6th Cir. 1995).

to Dunn identified where he was living with Nelson and Jones. A database search "suggested a connection between those three and Evans." The officers went to their apartment and encountered Nelson and Thompson, who said that Dunn and Jones would be found in another specific apartment. The officers noticed a store card in their car with the name of one of the robbery victims. Upon further questioning, Thompson said there were probably weapons in the apartment. Realizing what was up, she also said her infant child was in the apartment as well.

The officers went to the apartment and asked for the child. They were refused entry. They heard a voice yell not to open the door and lots of noises. They found an apartment complex manager but still couldn't get the door open with the key he had. They finally kicked in the door and entered with drawn weapons. Dunn and Evans tried to run, but all three adults in the apartment were secured and searched. The third adult, Kirby (Evans) the homeowner, and two children were removed; Kirby consented to a search of the apartment.

In the subsequent search, they found a pistol in the toilet tank and clothing matching that in the surveillance video. Evans and Dunn were arrested. Dunn confessed to all 7 robberies, Evans refused to make a statement. Thompson admitted that she knew that Evans, Jones and Dunn had been involved in the robberies. Kirby admitted that Jones and Evans shared the apartment with her and the Dunn was Jones' boyfriend and often stayed as well. All three helped with expenses.

Dunn and Evans were indicted. Both moved for suppression, with Evans also moving to suppress the photo identification. When their motions were denied, both took conditional guilty pleas and appealed.

ISSUE: May the current leaseholder have priority when consent is requested by law enforcement to search their residence?

HOLDING: Yes

DISCUSSION: Dunn argued that the officers lacked probable cause or exigent circumstances to enter and that Kirby's "consent to a search could not override the refusal of consent as a presently objecting co-tenant." The Court agreed the officers lacked a warrant, but agreed that their reasonable belief that the child was at risk was sufficient to justify their entry. They also had an objectively reasonable belief that the occupants were armed and that at least one small child was present. They also reasonably believed there was an attempt to get rid of evidence, as evidenced by the sound of moving items after they announced. At the time, they did not know that Evans was the child's father.

Once they lawfully entered, they obtained consent, freely and voluntarily, from the leaseholder (Kirby), who was the sole name on the lease and apparently held the only key. Once they searched and found the evidence, they had more than sufficient evidence to arrest both Evans and Dunn.

With respect to Dunn's confession, the Court noted that since the search was lawful, his subsequent confession could not be held to be the fruit of the poisonous tree of an unlawful search.

Both pleas were upheld.

SEARCH & SEIZURE – PROBATIONER

U.S. v. Lykins, 2013 WL 6125933 (6th Cir. 2013)

FACTS: Lykins was on supervised release for federal offenses. As part of that, he had been ordered to "permit a probation officer to visit him. … at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view…" He also agreed to "submit his person, residence and curtilage, office or vehicle to a search" when demanded. His first two years went well but on September 12, 2011, Lykins' probation officer, D'Alessandro, "received an undated, anonymous letter" suggesting Lykins was using drugs. He visited Lykins on October 1, planning to do a home inspection. When he arrived, along with Sheriff Peoples (Pendleton County, Ky) he changed his mind and decided to do a full search. He found "voluminous evidence of methamphetamine manufacturing" as well as a pistol in the microwave.

Lykins was arrested by Kentucky authorities. He was eventually turned over to the federal authorities and charged with various offenses, including manufacturing methamphetamine and having the firearm. He moved for suppression, arguing that the full search was improper. During the subsequent hearing, D'Alessandro noted that he was on the way to do the home inspection when he encountered Sheriff Peoples, who told him he'd received a notification from the National Precursor Log Exchange (NPLEx) about Lykins' wife making a precursor purchase. The Sheriff had already been investigating the Lykinses for possible involvement in manufacturing. When they arrived, Lykins admitted D'Alessandro, who held or left the door open for Peoples.

At the time they entered, Lykins was cooking, and the "smell filed the home." Peoples later testified, however, that once he entered, he smelled a "chemical odor," and recognized its significance in methamphetamine manufacturing. Both agreed that he'd drawn D'Alessandro's attention to the odor and that D'Alessandro was then able to differentiate it from the food odor. The District Court agreed that was sufficient to justify the reasonable suspicion standard required for the full search and denied the motion.

Lykins was convicted and appealed.

ISSUE: May a probationer's home be searched (by their probation officer) on reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court agreed that the search would be permissible under U.S. v. Knights.[70] if based upon reasonable suspicion. Unlike Knights, however, Lykins was on federal supervised release and the search conditions were "less invasive" than Knights. However, the Court agreed that the combination of evidence the officers had was enough to meet even a higher, probable cause, standard. The Court looked to the testimony about the door, finding that while the statements did not "entirely overlap" – they did not contradict, either. The trial court credited D'Alessandro's version of events, and as such, the appellate court agreed to uphold its decision.

The Court upheld his conviction.

SEARCH & SEIZURE – PRIVATE SEARCH DOCTRINE

U.S. V. Spicer, 2013 WL 6486800 (6th Cir. 2013)

FACTS: On July 25, 2007, Spicer checked into the Marriott Courtyard hotel in Columbus, OH. He paid with cash, including an additional deposit. While he was out, the next day, the maid entered to clean because the room had been listed as "vacant and dirty." She smelled marijuana smoke and saw marijuana on the floor so she contacted her supervisor. Two other hotel employees, including the assistant manager, responded to the room. They saw several personal items, including a backpack, and checked it for identification. Inside, they found "blocks of drugs wrapped in cellophane." The room was rekeyed and the police contacted.

Responding officers were taken to the room. The general manager knocked and tried to enter with his key, but "to the surprise of the general manager, Spicer was in the room, pushing on the door from the inside." Spicer came out into the hallway. Narcotics detectives arrived and entered to confirm the room was empty. They "saw the unzipped backpack in plain view … with what appeared to be three kilograms of cocaine inside." With a search warrant, the drugs were seized.

Spicer was indicted for possession with intent to distribute. He moved for suppression and was denied. He took a conditional guilty plea and appealed. A prior panel of the Sixth Circuit Court of Appeals vacated the District Court's denial. The District Court again denied the motion and again, he appealed.

ISSUE: May a hotel terminate a guest's residency by trying to lock them out of the room?

HOLDING: Yes

DISCUSSION: The Court agreed that a "hotel may lawfully terminate a guest's occupancy for unauthorized activity, including possession of illegal drugs."[71] Occupancy is terminated when the hotel takes "justifiable affirmative steps to repossess

[70] 534 U.S. 112 (2001)
[71] U.S. v. Lanier, 636 F.3d 228 (6th Cir. 2011).

[a] room … and to assert dominion and control over it."[72] Once the tenancy is terminated (even if unsuccessful, as was the case in this situation), a hotel employee may give consent to enter.[73]

The District Court's denial was upheld.

SUSPECT IDENTIFICATION

U.S. v. Watson / Lewis, 2013 WL 5508874 (6th Cir. 2013)

FACTS: In April, 2007, three armed men (Watson, Lewis and another) broke into a home in Dayton, Ohio. Six adults occupied the home. Lewis confronted Burg, Sr. and his two adult sons (Dwayne and Torrance) in a back bedroom. The third accomplice guarded the bedroom door and Watson remained at the front door.

The robbery "was unquestionably drug related." The three men were members of a street gang and they wanted drugs and cash from a drug operation run by Dwayne Burg, Jr. The Burgs initially denied possessing drugs or cash and eventually, Lewis shot and killed Burg, Sr. During that time, Watson was watching Burg's daughter, Hurston and Powers, a friend. Hurston got a "very long, steady look" at Watson, who was not masked. Powers did, as well. He finally ordered Hurston to stop looking at him. Eventually, the other two gunmen emerged with cash and all three fled the scene. None of the witnesses made an identification, despite being shown several photo arrays. The case went cold.

More than two years later, Dwayne Burg saw mugshots of Lewis and Watson on the news, in connection with an unrelated crime. Both Dwayne and Torrance immediately recognized Lewis. Hurston, advised by her brothers, also watched the news and identified Watson as they man she'd seen. A family member contacted the police and Det. Galbraith interviewed the witnesses. Lewis was identified by his gang name. He put together a photo array with Lewis's photo, with the help of another detective, which, he did not realize, was the same photo as used in the news report. Both of the Burgs identified Lewis. In January, 2010, six months later, Det. Gaier took over the homicide investigation. He approached Hurston, showing a photo array that included Watson, and she identified him. Powers was unable to make a positive ID, wavering between the photo of Watson and another man. Since the photo he used of Lewis was a 2009 mugshot, the detective obtained an earlier photo, taken around the time of the crime, and Powers immediately identified him.

Both men were indicted in federal court, charged with firearms law violations and the Hobbs Act. They both moved to suppress the identifications, arguing that Hurston's was not blind or sequential, and thus tainted. With respect to Powers, they argued that the detective failed "to include in the second array a photograph of the other man noted

[72] U.S. v. Cunag, 386 F.3d 888 (9th Cir. 2004).
[73] U.S. v. Allen, 106 F.3d 695 (6th Cir. 1997).

earlier by Powers as a potential match. Lewis also argued that the use of the same photo as already seen by the witnesses in the news report prejudiced the identification.

The District Court refused the motion and both took conditional guilty pleas. They appealed.

ISSUE: Does showing a suspect's photo on the news always taint an identification later?

HOLDING: No

DISCUSSION: The Court agreed that "due process forbids police officers from using identification procedures that are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[74] Since the purpose for this, however, "is not to ensure the reliability of identification evidence, but to deter malfeasance by investigating officers," suppression is not warranted "unless there is improper behavior by state officials giving rise to the suggestiveness."[75]

Looking at each identification in turn, the Court first addressed the non-blind, non-sequential lineup of Hurston of Watson and agreed it was not unduly suggestive. With respect to the criticism of Powers' identification, in which the second photo was not included, the Court agreed that it was, at best, barely suggestive. However, that is "not a constitutional problem," only undue suggestiveness is.[76] The Court noted that "Detective Gaier was quite careful and undoubtedly fair in administering both photo arrays." He provided instructions that indicated that the photo arrays may not contain a suspect's photo and nothing indicated that he "attempted to influence" the witness. The five fillers were proper. Further, the two photos were "quite distinct" from each other – and each was similar to the filler photos. The failure to include the other individual's photo did not create suggestiveness, and in fact, including that person's photo "may well have created undue suggestiveness towards" him. The Court upheld that identification.

With respect to the identification of Lewis, the Court noted that was no indication that the officers caused the photo to be used by the news and that such photos are public record and readily accessible on the internet. At most, it was "bad luck, not police malfeasance," which "led to any suggestiveness that there may have been in the identification procedure."

The Court affirmed the pleas of both men.

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[74] Simmons v. U.S., 390 U.S. 377 (1968).
[75] Perry v. New Hampshire, 132 S.Ct. 716 (2012).
[76] U.S. v. Beverly, 369 F.3d 516 (6th Cir. 2004).

42 U.S.C. §1983 – FIRST AMENDMENT

Wilkerson v. Warner (and others), 2013 WL 5878212 (6th Cir. 2013)

FACTS: On November 30, 2006, Dr. Tanter was a sponsored speaker at the University of Michigan campus. A number of individuals, including Wilkerson, attended to protest the speech. When heckling started, University officers "removed some of the protestors from the audience. Specifically, Officers West and Conners subdued Coleman outside the room and handcuffed him. Wilkerson, a medical doctor, saw Coleman on the floor and believing him to be unconscious, told the officers she was a doctor. She was allowed to assess his vital signs but the officers refused to remove his handcuffs. Others gathered around and Officer Warner (Ann Arbor PD) arrived. A line was formed by the officers, around Coleman, EMS had already been requested. When it arrived, Paramedic Jacobs took over, but Wilkerson "continued to communicate her unsolicited opinion" about the situation. Believing he was feigning unconsciousness, the paramedics broke an ammonia capsule under Coleman's nose. Upon request by the EMS crew, Officer Warner forcibly removed Wilkerson from the scene. (She later testified she was leaving when he grabbed her and twisted her arms, causing pain.) Coleman was transported.

Wilkerson was detained in the stairway. She declined to give a statement and was told she was free to leave. The officers made reports and additional reports were drafted several days to weeks later, to clarify issues that had arisen. Wilkerson publicly criticized all of the parties and filed a complaint against Officer Warner. After an investigation, Det. Matthews (UMDPS) requested a warrant against Wilkerson, for obstructing the officers and EMS. She was charged with several misdemeanor offenses. Almost a year later, she was found not guilty.

Wilkerson sued all of the officers involved, as well as the EMS employees, making claims under the First and Fourth Amendment. The District Court found in favor of all defendants, and Wilkerson appealed.

ISSUE: Is a person protesting EMS treatment of an individual engaged in "protected speech?"

HOLDING: No

DISCUSSION: Taking each claim in turn, the Court found no evidence to support a claim that Lloyd (one of the paramedics, who worked for a private EMS service) was acting in concert with any of the officers to deprive Wilkerson of any rights. Instead, the evidence supported the contention that he simply asked that she be removed so he could treat Coleman without distraction. (Although a claim cannot be made against a private individual for First or Fourth Amendment issues, if they worked in concert with government entities, the claim may be pursued.)

The Court further concluded she was not engaged in constitutionally -protected speech when she protested the medical measures being used on Coleman, because the treatment of Coleman "was not a public activity" where protest would serve any

measure but to interfere with trained medical personnel. The Court found no evidence that she suffered any retaliation for protected speech. The Court agreed that qualified immunity was appropriate, as well, for Officer Warner.

The Court agreed that her comments criticizing the law enforcement officers on the scene were protected speech, and that the officers somehow falsified their reports because of her criticisms. The Court agreed, however, that her actions were not even clearly protected speech at the time the situation occurred, however.

With respect to Fourth Amendment claims, she argued that Officer Warner did not have probable cause to seize her, as she did not physically interfere with Lloyd's treatment of Coleman. Further, she complained, there was no reason to detain her for up to 30 minutes and that doing so made it into a de facto arrest. She admitted that she'd heard Warner's order to step back, but didn't think it applied to her "as a medical professional giving aid on the scene." Officer Warner argued that she was not, in fact, giving aid, and his order, although perhaps misunderstood by her, was lawful. Other officers and the EMS crew all gave testimony that she was "repeatedly directed to move back but that she yelled and ignored the commands or only moved back briefly before coming forward again." The Court agreed that the officer had sufficient cause to do, at the least, an investigatory stop under Terry, and it concluded, also probable cause to arrest her at the time, although he did not, for her interference under Michigan law with the paramedics.

With respect to the force used, the Court agreed that it was reasonably related to the need, to remove her from the area. Once they got into the stairwell, the officer released her wrists, did not handcuff her nor did he use an additional force against her. (She sought no treatment for her alleged injuries, only self-prescribed therapy.) However, because there was dispute as to what actually occurred, the Court agreed that summary judgment was not appropriate at this point.

Finally, with respect to a claim of malicious prosecution, the Court noted that four factors must be proven (1) that a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) a lack of probable cause for the criminal prosecution; (3) that, as a legal consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) that the criminal proceeding was resolved in the plaintiff's favor.[77]

The Court looked at her allegations that Officer Warner made "false statements and material omissions" that led to her prosecution. Officer Warner argued that "he had no part whatsoever in the decision" to charge her, that he only filed a required report. There was no indication of any deliberate falsehoods and his report was consistent with other reports, if more detailed. He did not make the decision to charge, the prosecutor did. Officer Warner was not liable, as such, for malicious prosecution.

The Court upheld the dismissal of all claims, with the exception of the Fourth Amendment force claim against Officer Warner.

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[77] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010).

42 U.S.C. §1983 – USE OF FORCE

Jones v. Sandusky County, OH, 2013 WL 5992087 (6th Cir. 2013)

FACTS: On July 11, 2010, Tracy Jones was preparing to go to work when he got into an argument with his son, Bryan, who lived with him. The son threatened to kill his mother, Kim. Tracy ordered him out of the house but Bryan refused, saying he had a gun. Tracy left and called 911 from the home of another son, Brandon, who lived nearby. He told dispatch that the Sheriff's office had been there earlier to remove the son, but that he came back, making the threats. He also told dispatch that Bryan had been drinking for two days, was acting crazy, was in a house with loaded guns and would fight. Dispatch mistakenly told the responding deputies that Jones "was going to kill everybody and himself."

Deputies arrived shortly after 10 p.m. They looked in the window and saw Jones sitting on the couch, with a shotgun across his lap. His eyes were closed but he moved on occasion and "half-opened his eyes." They tried to call but Jones had unplugged the landline phone and had no cell phone. Sheriff Overmyer, having been notified, made his way to the house, confirming that Jones had been involved previously in a drive-by shooting. Sheriff Overmyer requested assistance from other agencies and put EMS on standby. He activated his tactical unit and four members of the team were summoned. As this was going on, Jones was under constant surveillance and moved little.

The team was authorized to make a forcible tactical entry, as the Sheriff was unsure the level of Jones's level of consciousness. Tracy provided information as to the layout and that the kitchen door was unlocked, but wanted to go inside and get Jones himself. The team refused that request. They implemented a plan using the unlocked door and planned the stack. When they reached the door of the living room, one deputy tossed in a flash bang and they all rushed in and shouted at Jones. He did not put down the weapon, but moved it, instead, "to a position where it was pointed at" the team." Two deputies fired on him, killing him. This all occurred in short succession.

Tracy and Kim Jones filed suit under 42 U.S.C. §1983 against the involved officers. Defendants moved for summary judgment, which was denied. They appealed.

ISSUE: Will a use of force incident be "carved up" into segments for analysis?

HOLDING: Yes

DISCUSSION: Both deputies requested qualified immunity in the deployment of the flash bang and the subsequent shooting. The Court noted that in this circuit, "when there are multiple instances of force used, the usual procedures in this circuit is to 'carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage.'"[78] In this situation, the trial court defined three segments for analysis: "1) the defendants' entry into the Jones's home without a

[78] Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996)

warrant; 2) the defendants' use of a flash-bang device when entering the home; and 3) the defendants' use of deadly force against Jones."

With respect to the use of the flash bang, the Court agreed that under prior case law, the use of a flash bang is a use of force.[79] However, the trial court did not "address whether Jones's right to not endure a flash-bang device was clearly established" in the first place. The court reversed the denial of summary judgment on that issue and remanded it back for further opportunity to address it.

With respect to the shooting itself, the Court also agreed that the summary judgment was inappropriate. There was factual dispute on several points, "including whether Jones had time to comply with the orders of the TRT or heard the orders in the first place, given the impact of the flash-bang device and whether, when he raised his gun, Jones was doing so solely because he was startled and awoken by the flash-bang device." A use of deadly force is assessed under "objective reasonableness," the standard is whether ""is whether a reasonable officer in [defendants]' shoes would have feared for his life, not what was in the mind of [the decedent] when he turned around with the gun in his hand."[80] "Independent of how much time [the deputies] may have given Jones to comply with their commands, there is evidence from three officers that they had time to observe [Jones] move his weapon and point it in the direction of the" team. His actual motivation is, the Court agreed, irrelevant. They confronted him only seconds after the flash bang was detonated. There was a question "as to what Jones was able to see or hear," as well as what the deputies "were able to see and hear and they approached" Jones. With the smoke, they could not clearly see what Jones was doing with the weapon. This created a "genuine issue of material fact as to what threat the police perceived before they fired at Jones, and more importantly, whether the threat was reasonable." The Court affirmed the denial of qualified immunity.

The Court further agreed that the proceeding must continue with respect to Sheriff Overmyer, as well, as the ultimate supervisor of the team.

In sum, the Court allowed for the summary judgment on the claim involving the flash bang, but affirmed the decision to deny summary judgment with respect to the shooting itself.

Hocker v. Pikeville City Police Department, 738 F.3d 150 (6th Cir. 2013)

FACTS: On August 13, 2010, Hocker got off work, drank a six pack of beer and at approximately 10:30 p.m., went to Batten's home. She was his occasional girlfriend, but at the time, had a protective order keeping him from the house. She called 911, reporting that he was "highly intoxicated" and "suicidal." He left the house in an identified vehicle. Officers Baisden and Branham (Pikeville PD) spotted the vehicle speeding past them, headlights off, on a winding, narrow road. The officers "gave

[79] Ramage v. Louisville/Jefferson Cnty. Metro Gov't, No. 11-5934, 2013 WL 1235652, (6th Cir. Mar. 28, 2013) and other cases.

[80] Bell v. City of East Cleveland, 125 F.3d 855, No. 96-3801, 1997 WL 6401166th Cir. 1997) (table); see Jones v. City of Cincinnati, 507 F. App'x 463, 468-69 (6th Cir. 2012)

chase" for seven miles, although Hocker later stated that he did not see or hear them. Hocker finally pulled off the main road onto a gravel drive and then he stopped.
Hocker later claimed that he was just stopping to insert a CD and then intended to back out of the drive and continue on his way. Due to an alleged engine defect, when he backed up the vehicle revved up, shooting it backwards, It possibly spun gravel and "most definitely", ran into Baisden's cruiser. He later said he thought he'd hit a telephone pole. The last thing he remember was "hearing shots (and possibly feeling one round hit his left side) before blacking out."

The officers added "a few undisputed facts and another perspective on these 25 seconds." Both turned off their sirens and got out of their vehicles. Baisden posted up on the driver's side door, taking cover "between the cruiser's body and his open driver's side door." He ordered Hocker to "show his hands and step out of his vehicle." Branham left his cruiser and moved to join Baisden. When Hocker's vehicle collided with Baisden's, the door swung shut and temporarily trapped Baisden's arm. Baisden had to backpedal as his cruiser was pushed 30 feet toward a ditch. Branham was also backpedaling and he moved left to avoid Baisden's moving vehicle. He opened fire on Hocker's car. Baisden freed himself and also fired on the car. From the spent casings, it appeared both officered fired from positions to the left of the vehicles. Twenty shots were fired and 9 struck Hocker. He blacked out, allegedly. The officers ordered him out of the car but he did not move. They removed him forcibly from the car and handcuffed him. He was taken for treatment.

Hocker was indicted on a variety of charges, including attempted murder. He took a guilty plea to Wanton Endangerment 1st, Fleeing and Evading 1st and DUI. Hocker then filed a lawsuit against the officers and Pikeville, under 42 U.S.C. §1983, claiming violations of the Fourth and Fourteenth Amendments. The District Court dismissed the lawsuit and Hocker further appealed.

ISSUE: Is proof of a Constitutional violation the initial element in a use of force analysis under 42 U.S.C. 1983?

HOLDING: Yes

DISCUSSION: The Court noted that the "facts of his chase, seizure and use of force provides a partial explanation" for the dismissal, while the "legal test for piercing the qualified immunity of officers protecting the public safety provides a complete one." The first test, the Court agreed, was not met – as Hocker did not "show a constitutional violation" on the part of the officers. The Court noted that "no doubt the use of deadly force by police officers is a serious matter and ought to be avoided - but not at all costs and not in all situations." The question remains - "why and to what end the police deployed the force." The court looked specifically to Tennessee v. Garner[81] and Scott v. Harris.[82]

[81] 471 U.S. 1 (1985).
[82] 550 U.S. 372 (2007).

Using that guidance, the Court found that the "officers did not use excessive force" against Hocker. In fact, he specifically pled guilty to a crime, Wanton Endangerment, which included the element of conduct that created a "substantial danger of death or serious physical injury to another person."[83] Only when that immediate risk did the two officers fire their weapons. Their response was "precisely the kinds of 'split-second judgments – in circumstances that are tense, uncertain and rapidly evolving,' – that they may, sometimes must, take in the line of duty."[84]

The Court continued:

> … it makes no difference that Hocker may not have intended to hurt the officers, that he may not have known the officers were trailing him, and that he may not have heard the officers insist he exit the car. The question is not Hocker's state of mind. It is whether a reasonable officer could perceive Hocker's actions as so dangerous as to warrant the force used. Hocker's un-communicated intent in driving the way he did in short has nothing to do with it.

Hocker's contention, also, that at the moment they fired, neither officer was in harm's way. The Court noted that "particularly in the context of the lightning-quick evolution of this encounter," it was not that simple. At the moment they started firing, neither officer clearly knew where their partner was located and the knowledge that they, themselves may be safe from immediate harm, did not mean that their partner was also safe. "This reality by itself justified the officers' conduct." At the time they fired, the "night's peril" had not ended. His previous course of conduct, over the previous minutes, "had put others, including most recently the officers, in harm's way." In fact, he remained in the car and the engine was still on, leaving the car operable. "From the officers' reasonable perspective, the peril remained."

Hocker argued that firing at the "driver's side of a *moving* (and potentially departing) vehicle" was unreasonable. The Court looked to other cases and found nothing to so indicate, and in fact, "acknowledged that there are many factors at play when deciding the reasonableness of an officer's use of deadly force" – such as the immediate threat to the officer or others, the severity of the crime at issue and "whether the suspect is actively resisting arrest or attempting to evade by flight."[85] The Court also included, as a factor, 'whether the officers 'had sufficient time … to assess the situation before 'using deadly force."[86]

Hocker submitted an affidavit from an expert witness. Since the District Court had discussed it, the Sixth Circuit panel decided to do the same. The Court noted that the expert had stated that Hocker had committed nothing more serious than a Class A misdemeanor; the Court disagreed. Instead, the Court noted that he had committed several felony offenses, in particular the Wanton Endangerment 1st during both the

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[83] KRS 508.060.
[84] Graham v. Connor, 490 U.S. 186 (1989).
[85] Smith v. Cupp, 430 F.3d 766 (6th Cir. 2006).
[86] Estate of Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008).

chase and the ramming. Even if the use of force might have violated some policy, "such a premise is wrong as "deadly force from time to time violates standard police training" and that didn't lead necessarily to liability. The Court noted that the expert assumed, wrongly, that the officers were safe once they moved out from behind [Hocker's] car. It was reasonable for them to assume that they were not.

The Court also agreed that the officers did not use excessive force when they removed him forcibly from the car. Using the same analysis as before, "Hocker comes up short – for many of the same reasons." When the officers got his door open, they "found a wounded man screaming profanities and grasping the steering wheel." The dangerous nature of his driving justified the officers' belief that he "posed a continuing, immediate threat to their safety and the safety of others."[87] A witness to the end of the chase confirmed that she saw the officers pulling, grabbing and hitting Hocker as he was inside and in fact, she never saw him outside the car. Hocker argued that bruising he had around his neck suggested he'd been dragged from the car that way, but the Court noted that the photo only shows faint bruising that could have occurred at any time. The Court agreed that 'no jury could reasonably find a Fourth Amendment violation based on this self-serving *interpretation* of the evidence by someone who did not remember what had happened."

The Court also discussed the use of a video recording taken by a bystander. After the incident, a witness took videos of the scene. The KSP officer gave him a choice, to delete the video or he would take the device into evidence. The video was deleted. The Court found no reason under these facts to issue a spoliation instruction as he noted that recordings of the "post-chase, post-collision, post-shooting, post-apprehension, post-everything crime scene" could not cast any light on Hocker's claims.

The Sixth Circuit agreed that no constitutional violation occurred and affirmed the dismissal of the case.

Saad v. Keller (and others), 2013 WL 6171341 (6th Cir. 2013)

FACTS: On July 10, 2010, Officer Keller (Dearborn Heights, MI, PD) was dispatched on a call of a harassing phone call. Solak, who received the call, said that Joseph Saad, who lived down the street, "had left a threatening message on her answering machine and had a history of leaving such messages." Officer Keller went to the house, knocked, and Saad answered. He agreed that he'd left the message. Saad later claimed that when he opened the door, Officer Keller placed his food inside. Officer Keller agreed he'd done so, but only when Saad "became irate when asked for identification, shoved him backwards, and told him to get off the property." Saad called to his mother, Sihra, and she came to the door and "began arguing with Officer Keller, who asked to see her identification."

Additional officers were arriving, in response to a call for backup. Officer Cates, Officer Gondek and Reserve Officer Nason arrived. Sgt. Skelton later arrived. Officer Cates,

[87] See Dunn v. Matatall, 549 F.3d 348 (6th Cir. 2008).

who'd gone to her car, returned, and was told that "they were entering the home to arrest Saad." Sgt. Skelton testified that Officer Keller gave a "non-verbal communication" to enter the home and make the arrest and that he "assumed that Officer Keller had a lawful basis to enter the Saad home and arrest Saad."

Saad later maintained he did not resist arrest but that Officer Keller immediately Tased him, and that he was "tased … a second time, gratuitously, when he was already incapacitated." He also claimed that the officer "needlessly beat him and Officer Gondek punched him several times," and continued to do so while he was on the floor. Keller's version differed, saying that Saad did resist arrest and continued to do so after being warned he would be Tased. He only stopped resisting and allowed himself to be handcuffed after being Tased twice. Officer Cates stated that Saad's mother "became irate, screamed at Cates, grabbed her shirt collar, pushed her, and scratched at her neck in order to get to Saad" after he was Tased. When the officer stated her intent to arrest her as well, Mrs. Saad "turned away and cross her arms across her chest." Mrs. Saad stated she was handcuffed before she knew what was happened, complained that the handcuffs were too tight and bruised her wrists. (A recording indicated she was saying "my hands, my hands" during the incident, and a booking video shows her "rubbing her wrists.") She also claimed to have been thrown to the ground on the way to the vehicle but Cates said she dropped to the ground "to resist being placed in the police car." Both Saads complained of chest pain at the jail and were taken for medical evaluation. Mrs. Saad, who had a pre-existing heart condition, was admitted. Officer Keller was treated for foot and ankle injuries.

Charges of resisting and obstructing were dismissed against Mrs. Saad. Saad went to trial on similar charges but received a directed verdict, with the Court concluding that due to inconsistencies in testimony, the jury could not possibly convict him.

Both filed suit against the officers under 42 U.S.C. §1983, claiming unlawful entry, unlawful arrest, and excessive force claims. The officers moved for summary judgment and were denied. The officers appealed.

ISSUE: Does a finding of probable cause bar a claim for malicious prosecution?

HOLDING: No

DISCUSSION: The Court first addressed the issue of whether Saad being bound over for trial precluded his bringing a claim related to probable cause (collateral estoppel). The Court looked to Darrah v. City of Oak Park[88] and agreed that "a finding of probable cause in a prior criminal proceeding" does not bar a claim for malicious prosecution in which it is argued that the police provided false information. In this case, the Court agreed the question as to whether Saad shoved or otherwise assaulted Officer Keller was at issue. The Court noted that did not bar a claim of unlawful entry and arrest.

[88] 255 F.3d 301 (6th Cir. 2001); see also Hinchman v. Moore, 312 F.3d 198 (6th Cir. 2002).

Further, since such facts were in dispute, it was not proper to resolve the issue at this state of the proceedings. In short, the only reason Officer Keller (and the other officers) could enter would be to arrest Saad for a felony (assaulting the officer), which Saad denied. Since the information provided by each was blatantly contradicted by the other, summary judgment was not possible. With respect to the remaining officers, however, it was not clear to the other officers that Saad's arrest was unlawful or to have any reason to question Keller's decision, and as such, the officers were entitled to qualified immunity on the issue of unlawful entry.

With respect to the excessive force claims, it was proper to deny Officer Gondek qualified immunity on the claim that he punched Saad after he was already on the floor, as the facts were in contradiction. The Court affirmed to denial on the excessive force claims against the officers, affirmed the denial to Keller on the unlawful entry and arrest claims, but reversed that decision with respect to the remaining officers.

Toner v. Village of Elkton (MI), 2013 WL 6183005 (6th Cir. 2013)

FACTS: On October 19, 2008, Toner was arrested for DUI, having been initially stopped for speeding and other traffic offenses. Video captured most of the initial exchange and the ensuing FSTs, as well. A PBT indicated his BA was .166. Toner cooperated in the arrest, but claimed at one point that one of the cuffs was too tight; Jobes loosened them slightly. The audio captured Jobes placing Toner into the back seat and several comments back and forth, as well as Jobes "chewing gum." Toner claimed several things happened during the process, including his head being smacked on the doorframe and his shoulder being "popped" by Jobes lifting up on the chain. Nothing in the intake records indicated any injury. A blood draw was done, pursuant to a search warrant. He was eventually released and pled guilty to DUI. He went to a doctor a few days after the arrest, complaining of shoulder pain, and a small tear in his rotator cuff was diagnosed. On March 1, 2011, he sued under 42 U.S.C. §1983, claiming excessive force against Officer Jobes and the Village of Elkton in making the arrest. The District Court dismissed the claim against the village and gave summary judgment to the claims against Jobes. Toner appealed the decision dismissing the claim against Jobes only, finding that Toner's version was "blatantly contradicted by [the] video and audio [recordings] associated with his arrest, along with the other information from the record."

ISSUE: May a Court give more credence to a recorded interaction?

HOLDING: Yes

DISCUSSION: Toner argued that it was error to disregard all of his factual allegations, "even though the incident forming the core of [his] complained occurred out of view of the video camera." The Court agreed with that, but nevertheless, held that his "allegations, even if proven, would not make out an excessive-force claim…." The Court agreed that when testimony is "only partially contradicted by audio and video

recordings, that does not permit the district court to discredit his entire version of the events." The absence of something on a recording is not evidence, necessarily, that it did not occur. However, the Court agreed, it was "not simply the lack of sound recorded on the audio, but also what was recorded, that blatantly contradicted [Toner's} allegations." Instead, it was the lack of any corroborating evidence, and a great deal of evidence that the conduct, if any, was less extreme than claimed. If anything, his claims point, at most, to carelessness, not wanton or intentional abuse. The Court did agree, however, that his assertion that there was no point in complaining at the jail since, he claimed, they were all "in cahoots" and bowled together lacked credence. The Court agreed that the trial court should not have summarily rejected his claims, however.

Nonetheless, the Court agreed that his allegations "suffer from a shortcoming that is equally fatal" – he simply didn't make a claim that violated his constitutional rights. Even had Jobes done as indicated, his behavior would still not have been excessive force, which much be assessed on the "objective reasonableness" standard. There was no indication Toner was subjected to "gratuitous violence." At most, he was given unneeded assistance in getting into the car. The Court agreed that Jobes' behavior did not add up to a Fourth Amendment violation.

The Court affirmed the dismissal of the action.

Burgess v. Sheriff Gene Fischer (Greene County, OH), 735 F.3d 462 (6th Cir. 2013)

FACTS: On January 23, 2009, Lucas Burgess was stopped for speeding and found to also be under the influence of Paxil. He failed FSTs and was arrested for DUI. He admitted not cooperating with Trooper Griffith (Ohio State Highway Patrol) and he was subjected to a "takedown." He did not suffer any apparent injuries at that time. He was disruptive on the way to the jail, belligerent and shouting expletives. The trooper warned the jail of Burgess's behavior, and several officers were waiting when they arrived, deputy sheriffs, corrections officers and a nurse. Deputies Barrett and McKinney tried to search him upon arrival and also had to do a takedown. Although there was dispute about injuries sustained at that time, Burgess claimed he had "excruciating pain" and a broken tooth. The nurse gave him ibuprofen and told him he could have additional medical attention if he desired. The deputies stated he was not compliant and resisted. They admitted he was taken to the ground but denied he was unconscious at any time. The nurse assessed him and found a small laceration and some bruising in his hands and wrists. Although the booking took a long time, it was mainly due to Burgess being "combative and intoxicated."

Shortly after 3 a.m., Burgess did a medical screening form in which he indicated no issues. Upon being released, he went to the hospital and had a CT scan, where he was found to have sustained several skull fractures which required surgery. He did not contact either the OSP or Greene County, but they learned of it through a routine followup to the use of force. The investigator determined that the officers had acted appropriately. Video of the incident was destroyed pursuant to the document retention policy.

Burgess filed suit, under 42 U.S.C. §1983, making a variety of claims against the parties. The defendants moved for summary judgment, which was granted. Burgess (and his wife, who filed her own claims) appealed.

ISSUE: Are the Fourth Amendment and Fourteenth Amendment standards different?

HOLDING: Yes

DISCUSSION: The Court assessed each of the claims.

The Court began:

> There is a long-standing principle that government officials are immune from civil liability under 42 U.S.C. §1983 when performing discretionary duties so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[89] Once raised, it is the plaintiff's burden to show that the defendants are not entitled to qualified immunity.[90] To determine whether qualified immunity applies in a given case, we use a two-step analysis: (1) viewing the facts in the light most favorable to the plaintiff, we determine whether the allegations give rise to a constitutional violation; and (2) we assess whether the right was clearly established at the time of the incident.[91] We can consider these steps in any order.[92]

The first step is to determine "under which constitutional amendment the right asserted was clearly established," since §1983 "does not confer substantive rights; rather, it is only a means to vindicate rights clearly conferred by the Constitution or laws of the United States."[93] Since an excessive force claim can be brought under the Fourth, the Eighth or the Fourteenth Amendment, "which amendment should be applied depends on the status of the plaintiff at the time of the incident; that is, whether the plaintiff was a free citizen, convicted prisoners, or fit in some gray area in between the two."[94] The Fourth Amendment applies to free citizens, the Eighth to convicted persons[95] and the Fourteenth applies to those in between – pretrial detainees.

A showing under the Fourteenth Amendment must meet a "substantially higher hurdle" than under the Fourth Amendment.[96] Under the Fourth, the "objective reasonableness" standard is applied. Three factors are used to guide the analysis: [97] "'[(1)] the severity of the crime at issue, [(2)] whether the suspect poses an immediate threat to the safety

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[89] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[90] No. 12-4191 Burgess, et al. v. Fischer*, et al.* Page 7 Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009).
[91] Campbell v. City of Springboro, Ohio, 700 F.3d 779, 786 (6th Cir. 2012); *see also* Saucier v. Katz, 533 U.S. 194, 201 (2001).
[92] Pearson v. Callahan, 555 U.S. 223, 236 (2009).
[93] Graham v. Connor, 490 U.S. 386 (1989).
[94] Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008); Phelps v. Coy, 286 F.3d 295 (6th Cir. 2002).
[95] Whitley v. Albers, 475 U.S. 312 (1986).
[96] Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001).
[97] Martin v. City of Broadview Heights, 712 F.3d 951 (6th Cir. 2013).

of the officers or others, and [(3)] whether he is actively resisting arrest or attempting to evade arrest by flight.'"[98] Further, these factors are assessed from the perspective of a reasonable officer on the scene making a split-second judgment under tense, uncertain, and rapidly evolving circumstances without the advantage of 20/20 hindsight."

In contrast, with the Fourteenth Amendment, the Court must "consider whether the defendant's conduct 'shocks the conscience' so as to amount to an arbitrary exercise of governmental power." A critical factor will be whether the defendant law enforcement officers have an opportunity to deliberate on their actions, or whether it was a "rapidly evolving, fluid and dangerous predicament." In short, the must decide if the officers acted '"'maliciously and sadistically for the very purpose of causing harm' rather than 'in a good faith effort to maintain or restore discipline.'"[99]

Further:

> Notwithstanding the Due Process Clause's broader applicability, we remain cognizant of the fact that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."[100]

In this case, the trial court elected to apply the Fourteenth Amendment standard, finding that there was no indication the deputies acted maliciously or sadistically. The Court, however, concluded that under Aldini v. Johnson[101], decided after Burgess's arrest, the Fourth Amendment standard should have been applied to the situation, in which a prisoner was in the booking room and had been surrendered to jail officials. Aldini established that the "dividing line between the Fourth and Fourteenth Amendment zones of protection was the probable cause hearing for warrantless arrests."

Finally, because there are disagreements as to the facts as to whether Burgess posed an immediate threat to the officers, the court could not resolve it in the officers' favor at this point. He was handcuffed, surrounded and to some degree compliant. He did make an offensive comment, but, the Court agreed the "case law overwhelmingly compels a finding that the takedown resulting in several fractures … was unreasonable and clearly established as being so."[102]

The Court reversed the summary judgment in favor of Barrett and McKinney.

With respect to failure to intervene claims, the Court agreed that mere presence during an altercation is not enough to place liability. The Court agreed that even if the two parties named (another officer and the nurse) believed the takedown was excessive, it

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[98] Martin, supra.
[99] See Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000)
[100] U.S. v. Lanier, 520 U.S. 259 (1997)
[101] 609 F.3d 858 (6th Cir. 2010),
[102] Schreiber v. Moe, 596 F.3d 323 (6th Cir. 2010)

simply didn't last long enough for them to have the "opportunity and means" to intercede. The court upheld their dismissal.

Finally, the Court addressed the destruction of the videotape. The Court agreed the county policy did not require the destruction, only permitted it, and in fact, the tapes, under the policy, should have been retained for a full five days. Since the agency had already looked into the incident by that time, the Court agreed the issue of spoliation should be put before a jury.

42 U.S.C. §1983 – SEARCH & SEIZURE

Lewis v. Weck, 535 Fed.Appx. 524 (6th Cir. 2013)

FACTS: Weck entered Lewis's Ohio home without a warrant, to inspect "for health and safety hazards." Weck contended that the house "was unoccupied, unused and in poor condition." Lewis filed suit and the District Court denied Weck's request for qualified immunity and dismissal. Weck appealed.

ISSUE: Do interior house inspections require a warrant?

HOLDING: Yes

DISCUSSION: The Court agreed that the trial court "correctly noted that the Fourth Amendment's warrant requirement applies to private residences and commercial premises, and that the warrant requirement 'applies with similar force even where municipal fire, health, or housing inspectors are conducting administrative searches.'"[103] The Court also agreed the right was clearly established at the time, despite Weck's argument that he got legal advice that it was permitted.

The court upheld the denial of qualified immunity.

42 U.S.C. §1983 – STATUTE OF LIMITATIONS

Hornback v. Lexington-Fayette Urban County Government, 2013 WL 5544580 (6th Cir. 2013)

FACTS: On August 31, 2010, Officers Graham and Dillingham (Kentucky Probation and Parole) arrived at Hornback's Lexington home to do a home visit on Bell, Hornback's roommate. As they entered they smelled marijuana. The officers requested help from other Probation and Parole officers as well as Officers Wilson and Rhea (Lexington PD). They did a warrantless search of Hornback's room and found marijuana. He was arrested and charged, initially, with felonies, but they were ultimately reduced to misdemeanors. Hornback moved for suppression and the trial court granted the motion. Ultimately, the charges against him were dismissed. Hornback then filed suit against the involved officers, claiming illegal search and

[103] Camara v. Municipal Court, 387 U.S. 523 (1967).

seizure. The District Court concluded the statute of limitations had expired and dismissed the claims. Hornback appealed.

ISSUE: When does the cause of action in an alleged unlawful search occur?

HOLDING: When the search actually happens.

DISCUSSION: Hornback argued that his cause of action did not accrue until the trial court ruled that the search of his bedroom, without a warrant, was illegal. The defendants, however, argued that his cause of action accrued on the day the search occurred, as he "knew or should have known of his injury at the time." The Court noted that state law determined the appropriate statute of limitation for a suit claimed under 42 U.S.C. §1983, and in Kentucky, that is one year. [104] However, federal law governs when the statute begins to run, and it ordinarily does not being until the plaintiff "has a complete and present cause of action." The Court agreed that in this situation, Hornback's cause of action accrued on the day of the search, since he should have known that since he was not under supervision, the search was unlawful. The Court noted that under Wallace v. Kato, some claims are redressable under §1983 even before the criminal case proceeds. "Claims of illegal search are analogous to claims of false arrest…." The Court upheld the dismissal.

42 U.S.C. §1983 – DISCRIMINATION

Hidden Village, LLC v. City of Lakewood, 734 F.3d 519 (6th Cir. 2013)

FACTS Hidden Village, an apartment complex in Lakewood, Ohio, was populated by young people released from foster care or juvenile detention. Most of the youth were black. There was dispute, initially, as to whether the location and use violated local zoning laws. Following that dispute, the police department, in 2006, circulated a memo to officers noted that citations and arrests were preferred in that area and subsequently, the residents began complaining about "police harassment," The Mayor wrote the sponsoring agency (Lutheran Metropolitan Ministries) expressing his intent to "seek to have the program removed from Lakewood…." In May, 2007, Lakewood officials visited the complex to do a "joint inspection" which left the residents fearful. Hidden Village sued under §1983 and the Fair Housing Act and the defendants sought summary judgment. The District Court rejected their demand and Lakewood (and individual defendants) appealed.

ISSUE: Is evidence that a concerted public safety effort is race-motivated admissible?

HOLDING: Yes

[104] Roberson v. Tennessee, 399 F.3d 792 (6th Cir. 2005).

DISCUSSION: Hidden Village filed suit, claiming that Lakewood discriminated against its tenants on account of race. Although Lakewood, as a city, is not eligible for qualified immunity, "liability against the city arises only if it violated a constitutional or statutory right through a custom or practice of doing so."

The Court agreed that there was "considerable evidence [which] shows a concerted effort to displace the program." Individual defendants, including the police chief and the Mayor, were implicated in this action as a result of communications with the sponsoring agency. A jury could conclude that race was a factor in the decision to target the complex, as the record indicated that the "Youth Re-Entry Program" was targeted for "unfavorable treatment" and that the police began citing the residents for rules "that the City never before enforced with such vigor." With respect to the inspection, which include a number of different city officials including a SWAT team, the fire department and the health department, the fire inspector noted that he was not given a "specific reason" for the inspection, which before had only been done after complaints or specific concerns. Only the buildings in the complex occupied by program participants were searched, and "to top it all off, the inspectors, contrary to protocol, asked residents to leave the building while the inspection took place." Finally, none of the white program participants, of which there were a few, ever complained of police harassment. In the context of other evidence, the race of the program participants was brought up in discussions. The Court agreed that the evidence supported a claim that the participants' race was a factor in the city's actions.

The Court upheld the denial of summary judgment and allowed most of the claims in the case to proceed.

42 U.S.C. §1983 – ARREST

Wilson v. Martin, 2013 WL 5567729 (6th Cir. 2013)

FACTS: In January, 2008, Lima (OH) stormed Wilson's home in search of a criminal suspect. Wilson huddled with her five children, including T.W. – Wilson and a toddler child were shot in the crossfire. Wilson died as a result.

About three years later, Officer Garlock responded to a street fight. A group of youths were in the street, but not fighting. T.W., now age 11, was in the group. T.W. broke away from the group, heading home. She "extended both of her middle fingers toward Officer Garlock's car" He yelled at her to come to him immediately, threatening her with being handcuffed. She told him that "her grandmother had forbidden her to speak to the police." She continued to walk toward home and Garlock went after her, ordering her to stop. He grabbed her "from behind, pulled her hands behind her, and pushed her forward to place her under arrest." Officer Woodworth arrived and helped Garlock handcuff her, and the two (much larger) officers pulled her to the cruiser. She was transported. There, Officer Boettiger told the other officers who she was (Wilson's daughter) and she was charged with "persistent disorderly conduct."

T.W. sued. The officers claimed qualified immunity, which was partially granted, but denied with respect to claims of false arrest, false imprisonment, unlawful seizure and detention, along with retaliation. The officers appealed.

ISSUE: Does profanity justify an arrest?

HOLDING: No

DISCUSSION: The Court first looked at T.W.'s claims under the Fourth Amendment. She alleged that the officers violated her rights by arresting her without probable cause to do so. The officers argued that when she refused to stop and continued to walk away, that was enough to justify her arrest for disorderly conduct. However, the officer conceded that profanity alone is not enough. The Court disagreed that a young juvenile raising her middle finger to an adult male officer was insufficient to cause a situation where violence was likely to occur. The Court agreed that her gesture, while crude, was not criminal, and "the officers were patently without probable cause to arrest her."

The officers also argued that they could arrest her for obstructing official business for failing to stop as ordered. However, the court noted, the officers had no legal basis to order her to stop in the first place. Finally, the officers argued they did not arrest her in retaliation for a wrongful death lawsuit against the agency with respect to her mother's death. The Court agreed that the facts, including the officer's identification of her as Wilson's daughter, argued otherwise.

The Court agreed that the officers were not entitled to summary judgment at this stage of the litigation.

Wynn v. Estes, 2013 WL 5912242 (6th Cir. 2013)

FACTS: On May 5, 2010, Wynn, an OB/GYN working for a Pulaski, TN, hospital, was alerted to the need to return to the hospital to deliver a baby. At about 8:50 p.m., Officer Estes (Pulaski PD) spotted Wynn speeding and made a traffic stop. There was dispute as to "the degree to which Wynn effectively communicated to Estes" as to what was going on, but it was undisputed that she was in scrubs and had a lab coat lying on the seat. Wynn apparently provided an OL and other ID, but then left the scene, heading to the hospital. Estes "tailed her to the hospital, and he immediately arrested her [for evading arrest] in the physician's parking lot."

Wynne filed suit under 42 U.S.C. §1983, claiming an unlawful arrest and excessive force. Officer Estes requested qualified immunity, which the District Court denied, finding that a reasonable jury could conclude that "Estes gave her permission to continue driving to the hospital" after concluding that she was, in fact, a doctor. Estes appealed.

ISSUE: If there are genuine issues of material fact, may a case be dismissed by the court?

HOLDING: No

DISCUSSION: The Court agreed that there was dispute over whether Estes made a statement that could be construed as permission to continue on to the hospital. The Court agreed that because there were "genuine issues of material fact" surrounding the case, it was necessary to deny summary judgment.[105]

42 U.S.C. §1983 - SEARCH

Schulz v. Gendregske / McDowell, 2013 WL 5912056 (6th Cir. 2013)

FACTS: Schulz, a resident of Clare County, Michigan, bred and sold golden retrievers. Schulz also owned horses. A court order had been issued allowing her to have only three dogs on the property. As a result, she had hired Laubscher to care for her dogs, on his property. On March 12, 2009, Animal Control officers Gendregske and McDowell responded to a report at Laubscher's home, having received a report that horses there were starving. They found that 9 horses were there and appeared underfed, and only one bale of hay was seen.

McDowell immediately prepared a search warrant, authorizing a search for, and seizure of, all animals on the property, including dogs and horses. With the warrant, they located 23 golden retrievers that "appeared to be healthy." Both Schulz and Laubscher were charged with abandonment and cruelty. A few weeks later, Schulz was sentenced on an unrelated animal charge and prohibited from owning or possessing animals for two years. Gendregske then put the seized dogs up for adoption. Shortly thereafter, Gendregske received a complaint that two adult golden retrievers were loose near Laubscher's residence. Upon investigation, he was told that Schulz's husband had left the dogs with Laubscher's sister, who then left them with Laubscher. Although details are in dispute, Gendregske notified Schulz's probation officer that she had "possessed an animal in violation of the court's order." However, after a hearing, a judge found insufficient evidence that she had, in fact, violated her probation. The ongoing criminal charges were also eventually dismissed.

Schulz sued the two animal control officers, among others. The officers moved for summary judgment, and received it with respect to some of the claims. They appealed the denial of summary judgment on the remaining claims.

ISSUE: Do errors in a warrant automatically warrant reversal?

HOLDING: No

[105] The police chief, upon being directly contacted by the family of Dr. Wynn's patient, intervened and had the doctor released before booking. She delivered the baby a short time afterward.

DISCUSSION: The Court agreed that there were statements in the initial warrant that were false or misleading, as, Schulz argues, he knew there was plenty of food for the dogs, that Laubscher was expecting a hay delivery that day for the horses and was preparing to break the ice on the water for the horses at the time animal control arrived. However, the Court agreed that "even with these omissions and alterations, there was probable cause to seize both the dogs and the horses." The Court noted that "common sense suggests that where there is evidence that an animal owner mistreats a substantial number of her animals, it is likely that she mistreats all of the animals in her care." The Court agreed McDowell (who prepared the affidavit) was entitled to qualified immunity on this issue. With respect to the false arrest claim, the Court agreed that since the two animal control officers neither made the arrest nor requested the warrant, they could not bear any responsibility for the arrest.

Finally, with respect to putting the dogs up for adoption, the Court noted that instead of seeking federal redress, that Schulz should have sought redress through state law, which provided her with a mechanism to press her claim. The Court agreed the Gedregske was entitled to qualified immunity on that claim as well.

TRIAL PROCEDURE / EVIDENCE – CRAWFORD

Poole v. MacLaren, 2013 WL 6284355 (6th Cir. 2013)

FACTS: On December 12, 2001, Covington was murdered at a home in Michigan he shared with his fiancée, Lester. Lester had purchased the home from Poole's uncle, Varner. A dispute arose between Lester and Varner. On that day, Coddington, who had a child with Varner, drove Poole to a location near the home. She waited and heard four gunshots; Poole then returned to the car. He told her that he'd shot Covington. Shortly thereafter, Varner told Coddington that he'd paid Poole to kill someone, and that "having Covington murdered made it easier for him to deal with Lester."

Coddington testified at the preliminary hearing, but recanted what she said at trial. She claimed she'd been threatened by a police officer and told what to say. In addition to Coddington's testimony, the case relied on a jail informant, Higginbotham, who stated that Varner said he'd paid Poole to kill Covington. In addition, Sgt. Gardner testified that Varner had offered to trade information about the murder for information in a separate murder, in exchange for leniency.

Poole was convicted of Murder and Possession of a Firearm by a Convicted Felon. The Michigan appellate courts upheld his conviction and he requested habeas corpus.

ISSUE: May a witness's statement be introduced by a third party?

HOLDING: No

DISCUSSION: Poole argued that the "admission of Varner's statement through the testimony of … Gardner violated the Confrontation Clause." The Court agreed that although it was error, that his testimony "was not a significant focus" in the case against Poole. In fact, his statement may have been more helpful to Poole than harmful, as it put a possible self-defense argument before the jury – as he said that Poole shot Covington because Covington had reached for a gun. While possible error, it was harmless error.

After resolving several other issues, the Court upheld Covington's convictions.

TRIAL PROCEDURE / EVIDENCE - HEARSAY

Desai v. Booker, 732 F.3d 628 (6th Cir. 2013)

FACTS: Turetzky and Booker, a nurse and doctor, respectively, opened a medical clinic in 1976 in Trenton, MI. Their personal relationship soured, however, and they tried to resolve it by opening a second clinic, so they did not have to work together. Tensions escalated to threats of physical and legal harm. In 1983, they agreed to dissolve the arrangement once Desai paid Turetzky for her investment in one of the clinics.

On November 7, 1983, Turetzky was found, strangled, in the front seat of her car. After some years, the investigation led to Desai, after another individual, Gorski, implicated him in grand jury testimony. Both Gorski and Adams had worked at Desai's clinic, and Adams had confessed to Gorski that he committed the murder for hire. Adams then headed to Arizona because Desai wanted him out of Michigan.

Both Desai and Adams were charged in 1995. They moved to dismiss based on the delay in prosecuting. They were finally tried in 2001 and Desai was convicted.

Desai appealed, initially, arguing that admitting Adams' confession to Gorski violated the Confrontation Clause. The Michigan state courts denied his appeal. By that time, however, the "Confrontation Clause no longer applied to non-testimonial hearsay such as the friend-to-friend confession from Adams to Gorski."[106] However, the Court allowed him to proceed on a due process claim and Michigan appealed.

ISSUE: Are some hearsay statements admissible?

HOLDING: Yes

DISCUSSION: Desai argued that the "admission of allegedly unreliable hearsay testimony violates the Due Process Clause." The Court noted, however, that there was only the most general of case law supporting his argument, agreeing that there is the possibility that the admission of some evidence would be "so extremely unfair that its

[106] Crawford v. Washington, supra; Ohio v. Roberts, 448 U.S. 56 (1980).

admission violates fundamental conceptions of justice." The state court had ruled that Adams' statement "fell within an established hearsay exception for statements against penal interest, which contains a reliability theory of its own" – an individual is not "lightly" going to admit murder. Additional evidence supported Desai's guilt even without that statement, as well

The Court reversed the District Court's grant of habeas corpus

CHILD PORNOGRAPHY

U.S. v. Marshall, 736 F.3d 492 (6th Cir. 2013)

FACTS: During summer, 2010, the FBI learned that an individual with a particular user name was "using a peer-to-peer file sharing program to share files containing child pornography." It was tracked to the IP address of a computer in Wauseon, Ohio. Using a search warrant, they seized two computers and other media from that location. Marshall, age 20, lived in the house, with his parents. He admitted downloading the material and that he had other such material of children ranging from 4-10. They found 261 images and 46 videos that were child pornography with file dates over the previous 5 years. He had also been participating in online chat sessions about it.

Marshall was a high school graduate, attending college part- time and also working. He had also been diagnosed with a human growth disorder, making him very short and of very young appearance. Individuals with this disability also often have delayed puberty. He had received treatment when diagnosed at age 15 and stood 5'5 and weighed 117 pounds at the time of his arrest. He told the agents that he was looking at individuals who looked "like him." Later testing suggested he had a low IQ and the mental age of 15 ½. A psychologist who evaluated him stated he was, in most respects, still a juvenile, as he had not yet matured sufficiently.

Marshall was charged with receiving child pornography under 18 U.S.C. §2252(a) and (b). He admitted to the crime and the judge took his condition into consideration in sentencing, but could not go below the mandatory minimum designated by law. In fact, the District Court, in the appeal from the sentence filed by Marshall, "expressed hope that the Court [of Appeals] would somehow give it some relief from the constrictions of the mandatory minimum."

ISSUE: Does federal law only look at chronological age for considering someone a juvenile?

HOLDING: Yes

DISCUSSION: Marshall argued that his sentence violated the Eighth Amendment because he was, in effect, a juvenile. The Court, however, noted that the "only type of 'age' that matters is chronological age" when assessing someone as a juvenile.

Although the Supreme Court had “recognized that drawing lines based on chronological age is a not-entirely but nonetheless necessary approach,” it was necessary to draw a line. In almost all states, Marshall had reached the age where he could claim many benefits of adulthood, such as marrying, voting, serving on a jury, etc. As such, neither “does his immaturity excuse him from the punishment the law imposes upon him as a consequence of that age.” Trying to find a different approach would be “essentially unmanageable.” Nothing in his medical history indicated that he would have less than normal intelligence and even his own witness could not tie his mental immaturity to his physical disorder.

The Court upheld his sentence.